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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1743

WILLIAM GOLDMAN,

Petitioner,

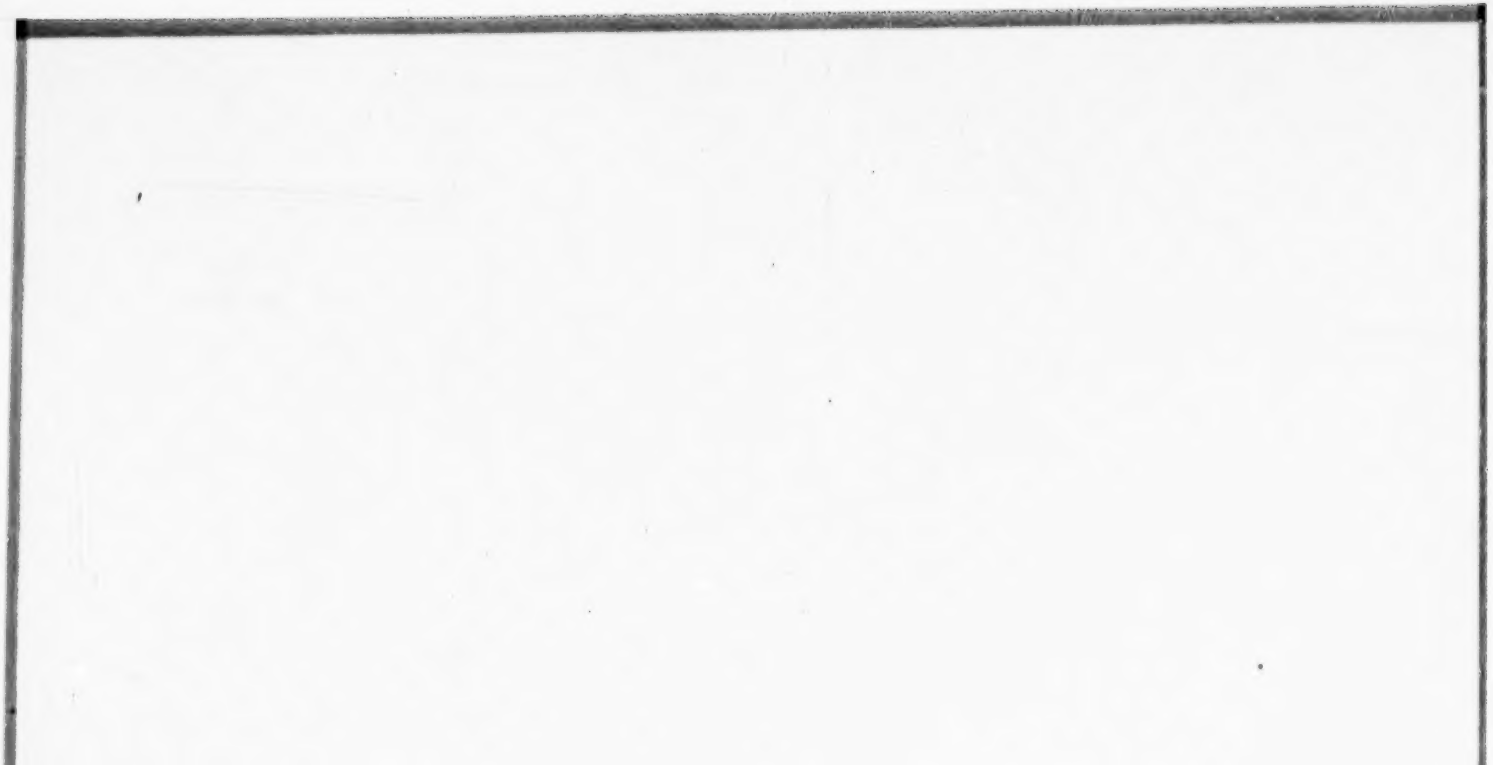
-against-

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

JACOB P. LEFKOWITZ
Attorney for Petitioner
William Goldman
Office & P. O. Address
150 Broadway
New York, New York 10038
Telephone: (212) 964-4845



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PEOPLE OF THE STATE OF NEW YORK,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, William Goldman, prays that a writ of certiorari be issued to review the judgment of the Court of Appeals of the State of New York, entered February 21, 1974.

The judgment affirmed the October 16, 1973 Appellate Division of the Supreme Court of the State of New York, First Judicial Department order affirming the New York County Supreme Court, March 9, 1973,

judgment of conviction on petitioner's guilty plea to the charge of grand larceny in the second degree to cover all counts of a 124 - count indictment charging the crimes of grand larceny in the second and third degrees and offering a false instrument for filing in the first degree, as well as affirming the denial, also on March 9, 1973, of petitioner's motion for withdrawal of that guilty plea and for leave to plead not guilty.

OPINIONS BELOW

There have been no "opinions below" in this matter.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Court of Appeals of the State of New York, entered February 21, 1974, is authorized by 28 U.S.C. §1257(3) and Supreme Court Rule 19 (1)(a).

QUESTIONS PRESENTED

1. Is the denial of a defendant's motion for withdrawal of his guilty plea, prior to sentence, without a hearing to determine the validity of his claims that he was innocent of the charges and was induced to change his plea by representations as to the sentence that would be imposed a denial of his due process rights under the United States Constitution?

2. Is the failure of the trial court to properly interrogate and advise the defendant at the time of the taking of the plea a denial of due process in the circumstances of the plea herein?

3. Has a defendant who has been induced to plea guilty by his counsel's false representation and assurances that he would not go to jail, when counsel was aware that the state prosecutor had promised that he would request that a sentence of incarceration be imposed, been denied effective assistance of counsel?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourteenth Amendment (due process), and the Sixth Amendment (assistance of counsel) of the United States Constitution.

STATEMENT OF THE CASE

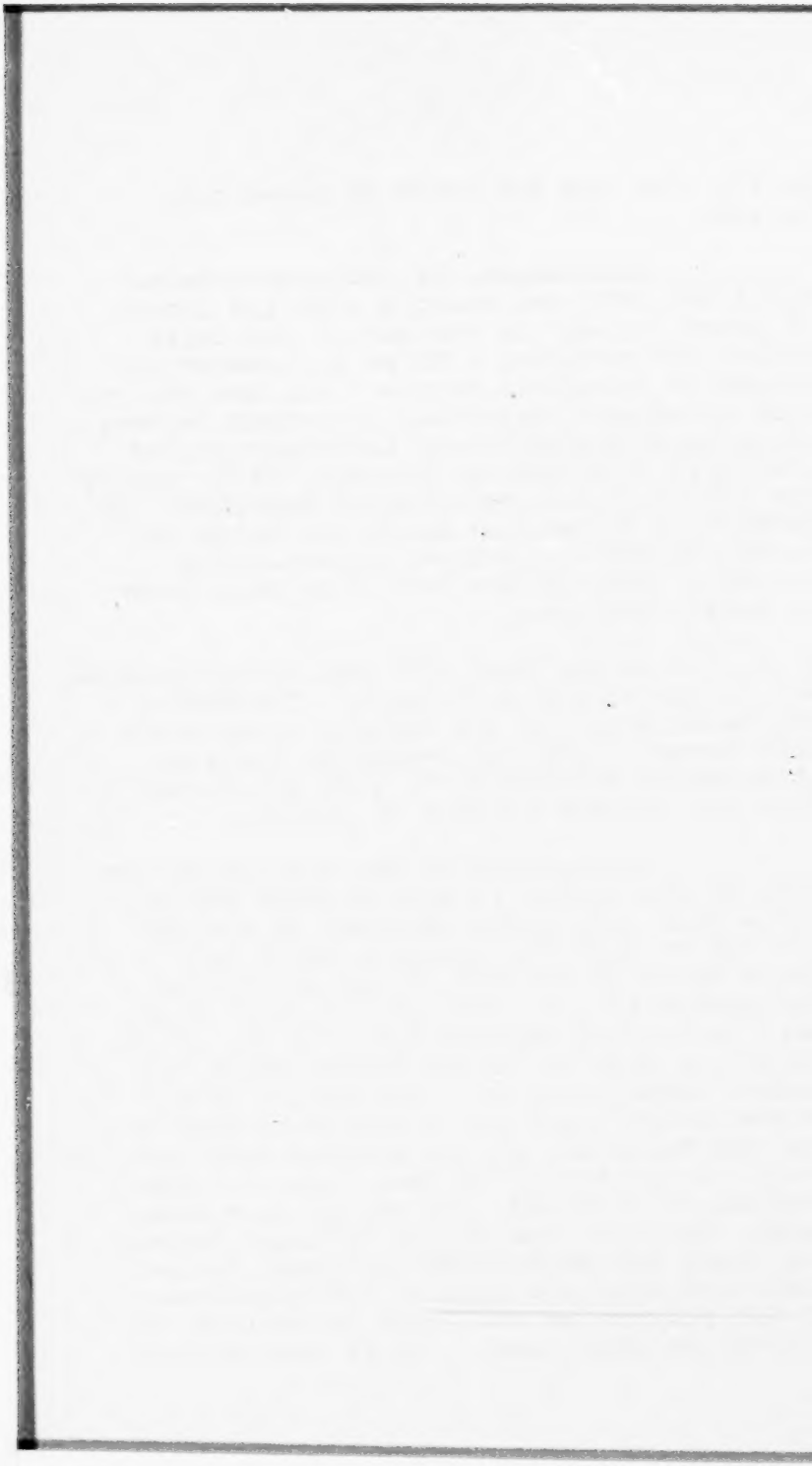
Petitioner seeks review of a judgment of the Court of Appeals of the State of New York, entered February 21, 1974 which affirmed, without opinion, the October 16, 1973 order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department affirming, without opinion, the New York County Supreme Court, March 9, 1973, judgment of conviction on petitioner's guilty plea to the charge of grand larceny in the second degree, as well as affirming the summary denial, also on March 9, 1973, of petitioner's motion for withdrawal of that

guilty plea and for leave to plead not guilty.

Petitioner, by indictment dated April 28, 1972 was charged with 124 counts of grand larceny in the second and third degree and offering a false instrument for filing in the first degree. All the charges were based upon defendant's claimed larceny of about $278,000 over a four-year period (January, 1968 through January, 1972) during the course of his practice of dentistry, in submitting false statements and false information for the purpose of obtaining payments from the New York City Department of Social Services.

On May 5th, 1972 petitioner pleaded not guilty to the indictment. Thereafter following negotiations between defendant's then counsel, and the Assistant District Attorney on October 18th, 1972 petitioner's plea was changed to that of guilty.

Examination of the minutes at the time of the change in plea reveals statements that petitioner received no indication as to what the sentence would be, there being an absence of any mention of the probability or even possibility of any jail term being imposed (A-27-32). It is submitted that it is not unreasonable to assume (especially in light of the facts stated below) that had a jail term been in the contemplation of the prosecution, the court, or petitioner's then counsel, some mention of it would, and should have been made. In fact, the entire colloquy between the court and petitioner is vague, incomplete and does not fulfill the requirements of due process as set forth in various decisions by this court. It is that failure

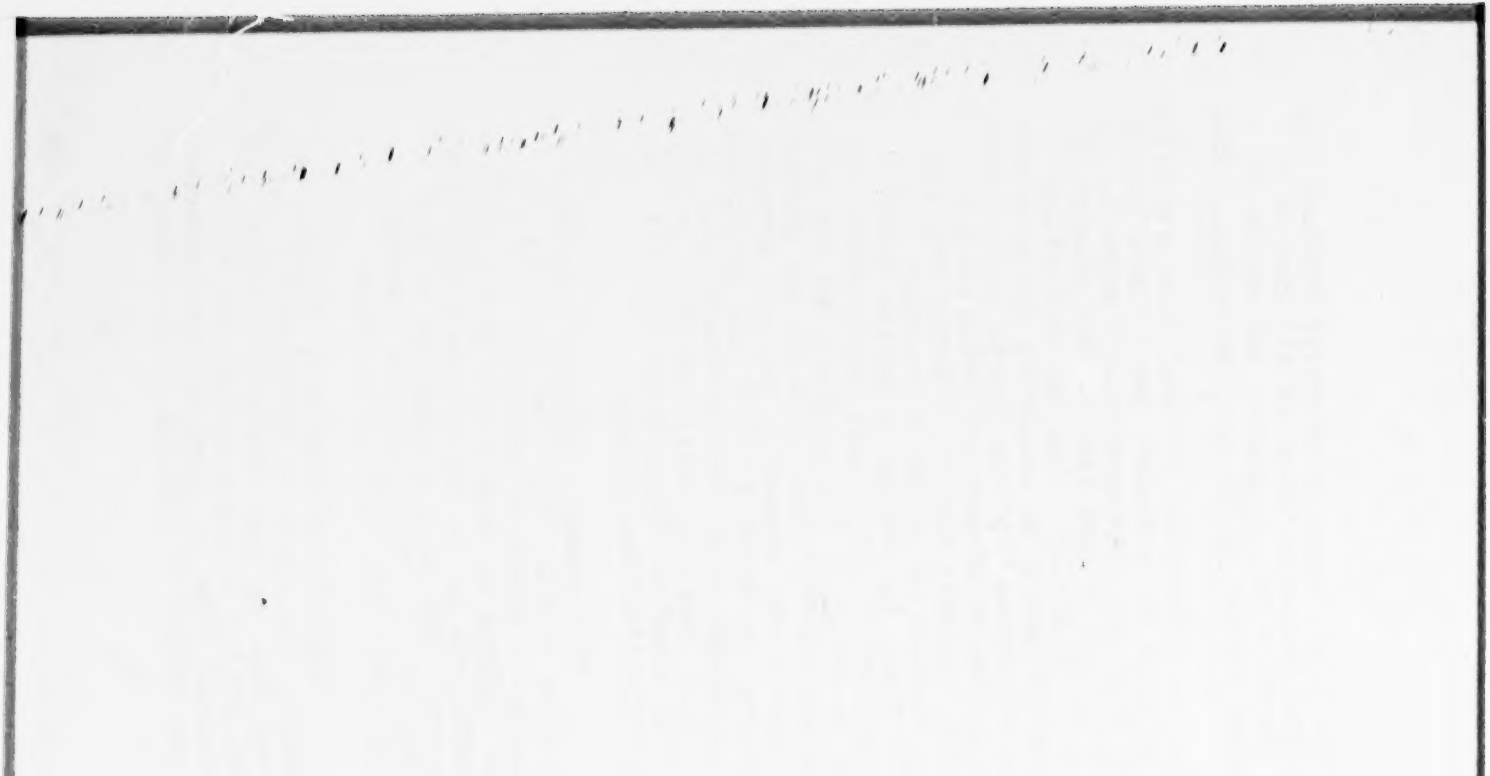


by the trial court to properly conduct that required colloquy which is alluded to in our Question No. 2, supra, and which is treated further under our "Reasons", infra.

Subsequent to that date but prior to the date of sentence, petitioner became aware that the representations made to him prior to and at the time of the change of his plea to guilty, that no term of imprisonment would be sought by the prosecution, or imposed by the Court, were incorrect. Thus he sought and retained his present counsel, who was substituted for prior counsel on or about February 26th, 1973. Then, by notice of motion dated February 27th, 1973, petitioner moved for leave to withdraw his guilty plea and to reinstate his original plea of not guilty. This motion was summarily denied, without a hearing, on March 9, 1973 and petitioner was sentenced to an indeterminate term of up to four years (a certified copy of the sentence minutes, dated March 9, 1974, is being submitted separately).

This summary denial, without a hearing to inquire into the validity of petitioner's claim of innocence and that he was induced to change his plea by representations as to the sentence that would be imposed, has been alluded to in our Question No. 1, supra, and is treated further under our "Reasons", infra.

Petitioner's primary argument on his motion for leave to withdraw his guilty plea was that he was induced to change his plea to guilty by representations of his then counsel that no term of imprisonment would be sought or imposed. The extent of



the misrepresentations were later discovered when it was revealed, in a sworn affidavit by the Assistant District Attorney, that it was always the position of the People to request that a sentence of incarceration be imposed and that this was consistently represented to petitioner's then counsel (A-20) (see also A-38-39).

It is clear, however, from examination of the record, that this promise by the Assistant District Attorney, to request incarceration was never conveyed to the petitioner. At the time of the guilty plea herein, petitioner's then counsel stated:

> "May I also say something, your Honor, at this point. Doctor, there has been no promise made to you by your attorney or *indication as to what would happen with respect to this sentence*, is that right, Doctor?
>
> "The Defendant: Yes, sir." (Emphasis supplied) (A-30)

In addition, in an unusual letter to Alfred Scotti, Esq. of the District Attorney's Office, New York County, dated March 1, 1973 petitioner's then counsel also stated that he and other member of his firm:

> "...spent many hours in the past year discussing with the defendant the details of the above indictment. During that time and specifically

> before the plea of guilty was entered on October 19, 1972, he was fully advised of the ramification of pleading and was similarly *advised that no commitments or promises could be made with regard to punishment* or the amount of restitution required." (A-33) (emphasis supplied)

If it is true (and there appears to be no reason to doubt the sworn word of the Assistant District Attorney) that it was always the position of the People to request that a sentence of incarceration be imposed, and this was consistently represented to petitioner's then counsel (A-20), then that counsel's statements assume a most curious aspect. This aspect has been alluded to in our Question No. 3, supra, and is treated further under our "Reasons", infra.

REASONS FOR GRANTING THE WRIT

The courts below have decided substantial questions of federal constitutional law in a manner clearly contrary to applicable decisions of this Court.

1. Concerning the involuntary nature of petitioner's plea of guilty:

It is beyond dispute that a defendant by his plea of guilty waives various Constitutional rights. Thus, the law is clear that

> "the question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards, *Douglas v. Alabama*, 380 U.S. 415, 422, 85 S. Ct. 1074, 1078, 13 L.Ed.2d 934". *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

Therefore, while almost, if not all, Constitutional protection for the citizen can be waived, such waiver must be made voluntarily. In order for a voluntary waiver to take place it must be made with knowledge of the rights waived and the consequences thereof. In other words, in order for such a waiver to be valid under the due process clause, it must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences (see *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); see also *McCarthy v. United States*, 394 U.S. 459, 466 (1969)).

Here the petitioner, when he was assured that he would not go to jail and was never informed of the promise by the prosecutor that incarceration would be requested, was misinformed, misadvised, misled and induced by his former counsel. For this reason, petitioner did not understand the consequences of his plea, he simply lacked the requisite knowledge necessary to make a knowing and intelligent waiver of his constitutional rights. Where a plea is made without any understanding of the consequences of such plea, it is well settled that to allow that plea to stand, as has been done here, would be manifest

and substantial injustice operating as a denial of due process (see *McCarthy v. United States*, supra; see also *Brady v. United States*, 397 U.S. 742 (1970); *Boykin v. Alabama*, supra; *Halliday v. United States*, 394 U.S. 831 (1969)).

2. It can be seen, by a careful reading of the appellate cases in the area discussed above, that most of the fact situations occur either where the defendant has been misled, inadvertently or otherwise, by the trial court and/or the prosecutor, or where a plea bargain has not been fulfilled. It is harder to find a fact situation where the misinformation, misadvice, etc. has come from the defendant's own attorney. This is, and it must be stressed, not because the principles of law are any different as to waiver, and its voluntariness, (where the misinformation or misleading inducement has come from the defendant's attorney) but rather because it is harder to prove the circumstances in such instance. Where the court or prosecutor is involved, one has either the record (one reason for the judicial interrogation required at the time the plea is taken, see discussion, infra) or the statements and affidavits of the attorney; but in an instance where the attorney is at fault or has erred one has, usually, only the statement of the defendant, an accused "criminal" who has pleaded guilty. Thus, it is not a matter of law but rather of proof that becomes involved. It is for that reason the law requires a prompt factual hearing be granted in order to ascertain the validity of a defendant's contentions. Even though the facts here, on their face, support petitioner's

contentions, no such hearing was granted and his motion to withdraw his plea summarily denied. The manifest and substantial injustice inherent in such a denial is obvious.

3. Factually this matter would appear to be one of first impression at certiorari level (except, perhaps, for the somewhat similar factual pattern of *LaVallee v. Mosher*, No. 73-1328).

However, the principles involved herein are clear, well-settled and this matter calls for no more than a reaffirming of those principles.

4. As discussed above, a plea of guilty involves a waiver of substantial rights guaranteed under the United States Constitution. It is for this reason that

> "all trial courts are now required to interrogate the defendants who enter guilty pleas so that the waiver of these fundamental rights will affirmatively appear in the record. *McCarthy v. United States* (cite omitted), *Boykin v. Alabama* (cite omitted)" (Mr. Justice Douglas concurring in *Santobello v. New York*, 404 U.S. 257, 266 (1971)

5. It is obvious that a defendant who enters a plea of guilty must be aware of the potential (or promised) penalty before he can knowingly and

intelligently waive his rights and that this should appear on the record. This is required, for good reason, in federal courts, by the Federal Rules of Criminal Procedure Rule 11. It is submitted the same rule, in substance, must apply to the state courts. Thus, the court before accepting the plea should inquire whether the defendant knows what he is doing, and is aware of the rights which he has, and of the consequences of his plea. The reasons for this are obvious, for protection of both the defendant and the Criminal Justice System. By complete and detailed interrogation of the defendant by the trial judge, the Court is able to ascertain whether the defendant is knowingly and voluntarily offering to plead guilty, whether he has been fully informed as to what his rights are and the consequences of his waiver of those rights. If the defendant has been misinformed, misadvised or induced then this is the point where the trial judge can both discover and correct such occurrences by either properly advising the defendant or by refusing to accept the plea until and unless it is done properly. This also protects the Criminal Justice System by providing a complete record, containing all of the factors necessary for a sentencing and/or reviewing Court, preventing all the difficulties that, of course, can and do arise from a vague and incomplete record, thus saving valuable court time. Had the trial court properly conducted a more detailed comprehensive interrogation as due process requires instead of the vague, incomplete and indifferent inquiry that it did conduct (A-27-32) it is submitted that the result in the instant case would have been

either a non-acceptance of the plea by the court or a withdrawal by the defendant of his offer to plead. The error committed by the trial court in failing to properly interrogate and advise the defendant, compounded by its wrongful refusal to permit a hearing on defendant's motion to withdraw his plea has resulted in the instant situation. If there was an unfulfilled plea bargain, or if there was misrepresentation, inducement and misadvise by prior counsel a complete record would not only reveal it, but in fact, have prevented it from prejudicing the rights of the defendant, as has occurred here.

6. This Court should grant certiorari in order to clarify the rules as to the taking of a plea by the trial court and the manner in which a plea bargain (or as here, a promise of a recommendation of incarceration) should be placed on the record, so as to protect both the rights of individual defendants and the integrity of the Criminal Justice System.

7. If it is fact that it was always the position of the prosecutor to request that a sentence of incarceration be imposed, that this was consistently represented to petitioner's then counsel (A-20) then it was the duty of that counsel to so inform petitioner. Yet it is clear from the record from that counsel's own unsworn letter that he advised the petitioner that no promises, commitments or indications were or could be made regarding the sentence herein (A-30, A-33). Certainly, continuing statements by a prosecutor that he is going to request an incarceratory sentence, rather than remain

silent, or ask for leniency, is an indication as to what would happen with respect to the sentence; and is a commitment or promise by the prosecutor. Therefore, that counsel's conduct was of such a kind as to shock the conscience of the court and make the proceedings a farce and mockery of justice, thus denying petitioner the effective assistance of counsel to which he is entitled under the Sixth and Fourteenth Amendments and should not be tolerated by this Court.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

JACOB P. LEFKOWITZ
Attorney for Petitioner
William Goldman

NOTICE OF MOTION FOR
WITHDRAWAL OF PLEA

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

-against-

WILLIAM GOLDMAN,

Defendant.

S I R S:

PLEASE TAKE NOTICE, that upon the annexed affidavit of William Goldman, duly sworn to the 27th day of February, 1973, the indictment previously filed herein, the annexed Exhibit "A", and upon all the proceedings had herein, the undersigned, on behalf of the abovenamed defendant, will apply to the Hon. Frank Blangiardo, Judge of the New York State Supreme Court, sitting at Criminal Term Part of this Court, located at the New York Criminal Court Building, 100 Centre Street, New York, N. Y. for the following relief:

1. That the defendant be permitted to withdraw his plea of guilty and be permitted to enter a plea of not guilty pursuant to Section 220.60(4) of the Criminal Procedure Law of the State of New York on the ground that he is not guilty of the offenses charged in the indictment and that such plea was coerced and induced by promises and representations as set forth in detail in the attached affidavit.

2. For such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
February 27, 1973

Yours, etc.

JACOB P. LEFKOWITZ
Attorney for Defendant
150 Broadway
New York, N. Y. 10038
964-4845

TO:

CLERK OF THE ABOVE COURT

HON. FRANK HOGAN
District Attorney for
New York County
New York, N.Y.

AFFIDAVIT OF WILLIAM GOLDMAN
IN SUPPORT OF MOTION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WILLIAM GOLDMAN, being duly sworn, deposes and says:

That he is the defendant in the above entitled action and makes this affidavit in support of his application to change his plea, to wit: withdraw his plea of guilty and be permitted to enter a plea of not guilty pursuant to Section 220.60 of the Criminal Procedure Law of the State of New York.

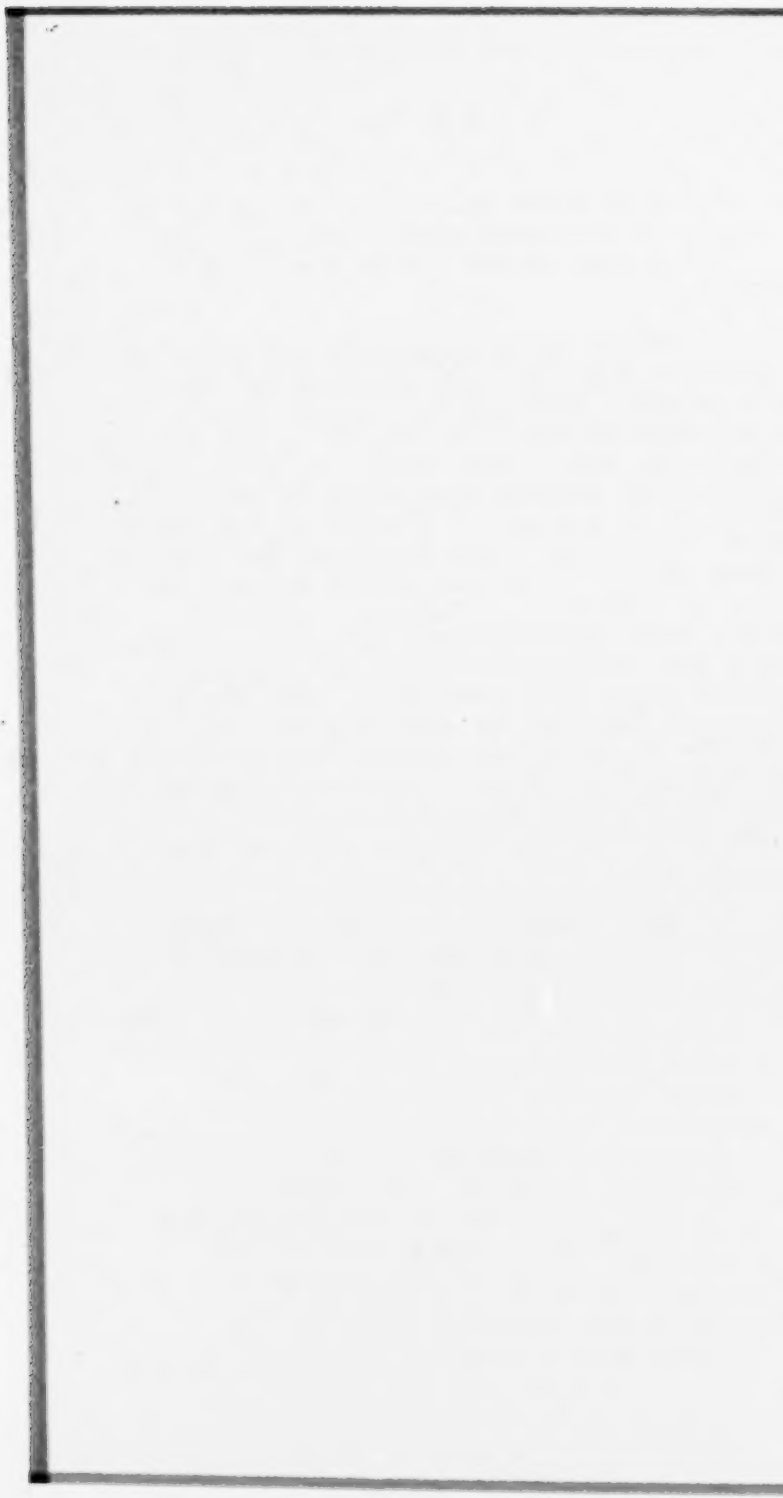
That heretofore and on or about November, 1972, deponent pleaded guilty before the Hon. Frank Blangiardo to count 2 of Indictment No. 2163/1972 to cover all the counts therein, and defendant is now awaiting the date of sentence which is scheduled for the 28th day of February, 1973. Your deponent believes and has been advised that he has a good and meritorious legal defense to all of the counts of the indictment herein and is innocent of the charges of which he stands accused by this indictment.

Deponent did not freely plead guilty but was coerced by the promise of having a quick and total disposition of

this entire problem by a plea of guilty to one count of the indictment coupled with restitution that would spare him a jail sentence.

Prior to withdrawing his plea of not guilty, deponent was advised by his then attorney, William E. Ringel, Esq., that because of the 124 counts in the indictment, he was facing many years in jail. The fact that counsel was able to obtain an acceptance of a plea of guilty to one count thereof, indicated that deponent had little to worry about being sentenced to jail on the day of sentence. Further, that if deponent made restitution, he would assure himself the full possibility of not being sentenced to a jail sentence. The amount of restitution that he was advised that he would have to make was within the confines of deponent's ability to muster and make, namely $10,000 and if necessary, $30,000 more to be realized from the sale of his home.

Last week his counsel informed deponent that he obtained the representation from the Corporation Counsel of the City of New York that if deponent will make restitution of $80,000 and sign a confession of judgment for $250,000 that then the Corporation Counsel would not ask for a jail sentence for deponent herein from the Court. Now, when deponent told his counsel Mr. Ringel that he never mentioned such figures to him and that it was impossible for him to meet such demand and in any event, deponent asked of Mr. Ringel his then counsel if it were possible for him to make such restitution, that he had never before told him about prior to asking



him to plead guilty, would that mean that he would not go to jail and his then counsel responded - no, you will go to jail anyway but it will mitigate your sentence.

Your deponent was completely placed in fear, misled and coerced into withdrawing his plea of not guilty and change to a plea of guilty to one count of the herein indictment by the aforesaid misleading, coercive promises and statements, which were utterly in essence false.

Your deponent has at all times protested his innocence to his counsel and asked for the opportunity to have his day in Court and to stand trial on the charges herein in order to be proven innocent thereof.

Attached hereto and made a part hereof is a copy of a typed memorandum that was sent in to the Probation Department by deponent's then counsel Mr. Ringel which explicitly shows the various and many reasons that his then counsel set forth showing that deponent has a good, valid and meritorious defense in law and in fact to the charges of the indictment and is indeed innocent of said charges. Said memorandum also specifically shows that (from page 3 thereof at the bottom)

> "As to restitution, if no jail sentence is imposed, his family could scrape together some money, probably about $10,000. To this sum could be added $30,000 which Dr. Goldman might realize from

> the sale of his home. Additionally, Medicaid is indebted to him in the sum of approximately $40,000, for services rendered but unpaid, which moneys could be assigned by Dr. Goldman. The total of these sums in the amount of approximately $80,000, I am informed, constitutes the maximum restitution possible by him."

Deponent was coerced and induced, despite his protestations of innocence, to dispose of his case by a plea of guilty to this one count on the promises and representations set forth herein. The City denies that it owes $40,000 to the deponent herein. Deponent is now asked to provide the full $80,000 in restitution. At this time the demand for $80,000 in restitution, regardless of any promise for such restitution, when such restitution is impossible of performance, clearly indicates the coercion and inducement that was practiced and which caused your deponent to capitulate and plead guilty, despite his protestations of innocence. Your deponent is 66 years of age, a happily married man and the father of two children, who has led an honorable and exemplary life, both in the community and in the profession, served in the Armed Forces as a Captain for three years and under the circumstances when he has been deprived of the freedom of action and decision to stand trial where he has indeed a good and meritorious defense to prove his innocence of the charges in the indictment, justice and equity demand and

the law gives this Honorable Court the discretion to grant to your deponent his day in Court.

WHEREFORE, deponent prays that the application herein for withdrawal of his plea of guilty and interpose the plea of not guilty to the indictment be granted.

s/ William Goldman
WILLIAM GOLDMAN

[Duly Sworn to
February 27th, 1973]

EXHIBIT "A" - LETTER DATED NOVEMBER 22, 1972 WITH RESUME - ANNEXED TO AFFIDAVIT IN SUPPORT

Law Offices

D E L S O N & G O R D O N
230 Park Avenue
New York, N. Y. 10017

November 22, 1972

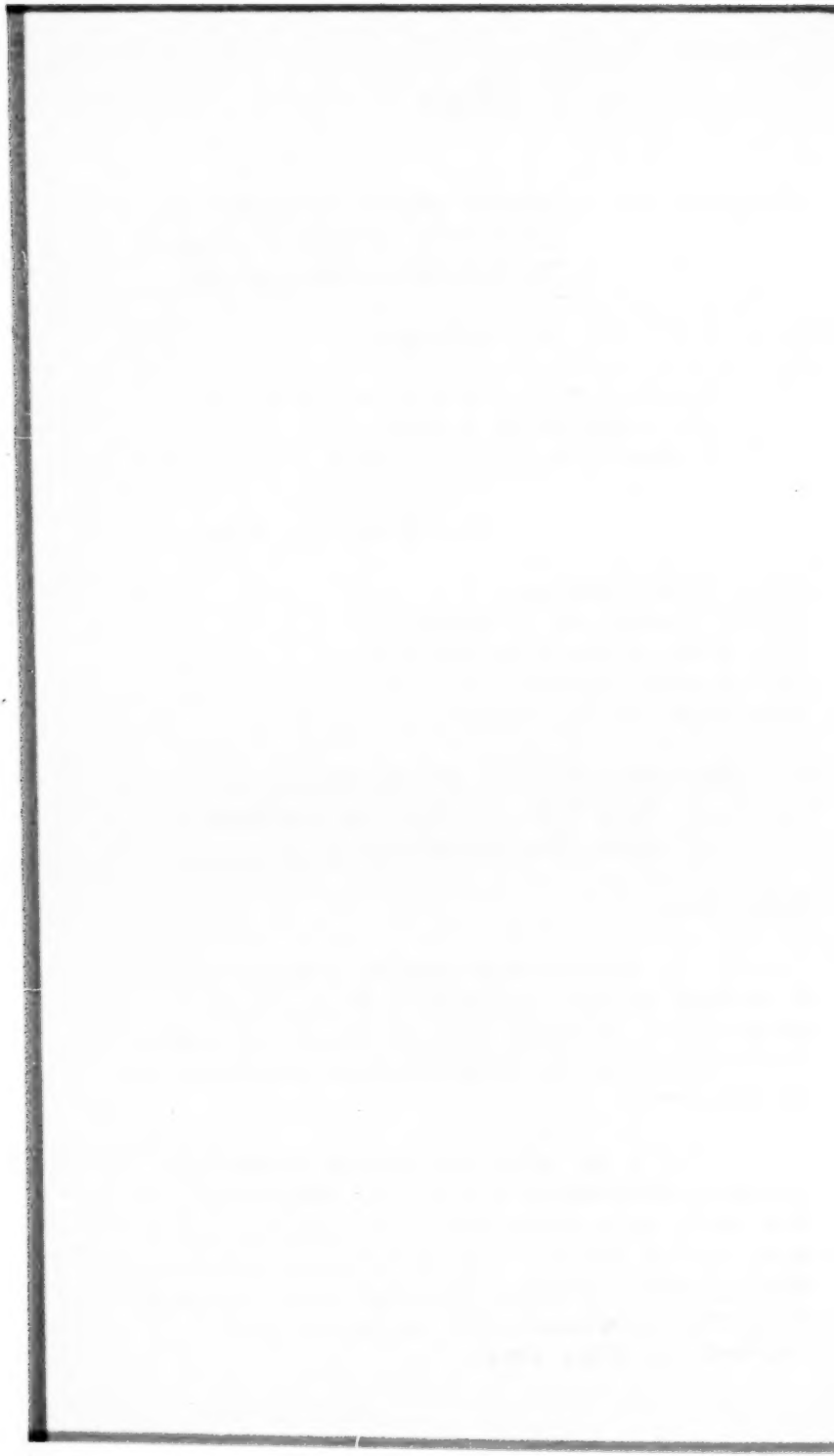
Hon. Elmer Reeves
Chief Probation Officer
New York State Supreme Court
100 Centre Street
New York, N. Y. 10013

Re: The People of the State of New York v. William Goldman - Ind. No. 2163/1972

Dear Sir:

Enclosed herewith please find a resume of Dr. Goldman's background pertaining to this matter which is under investigation by Magda Rebhun preparatory to sentence.

I am also enclosing herewith various documents issued by Medicaid. You will note from these documents how easy it is for one to go astray, considering particularly the red tape surrounding the treatment and requests for payment in this area.



Several letters of recommendation are also enclosed for your further information.

I shall be happy to discuss this matter with you in person should that be advisable.

Cordially yours,

s/ William E. Ringel
William E. Ringel

WER:jac

Enclosures

[People v. Goldman -
Indictment No. 2163-1972]

[Sentence date:
December 11, 1972
(Blangiardi, J.)]

Resumé

Re: Dr. William Goldman, D.D.S.
Age 66 years
Father and grandfather
No prior criminal involvement

1. Served World War II, 1943-1946
Entered U.S. Army as 1st Lieut.,
promoted to rank of Captain.
Served as Dental Officer and,
in addition to his other duties,
as Special Service Officer.
Medals received:
(1) American Campaign Medal
(2) World War II Victory Medal.
Received Honorable Discharge.

2. Member Madison Jewish Center,
20 years.

3. Member and Lecturer for the
American Dental Society (Second
Dental District) for the past
10 years.

4. Received some 10 certificates
from the Dental Society in
appreciation of the services
rendered.

5. Member American Legion, Post #373, for 20 years.

6. Member Masonic Order, 20 years.

7. Member Bialystoker Home for The Aged, over 20 years.

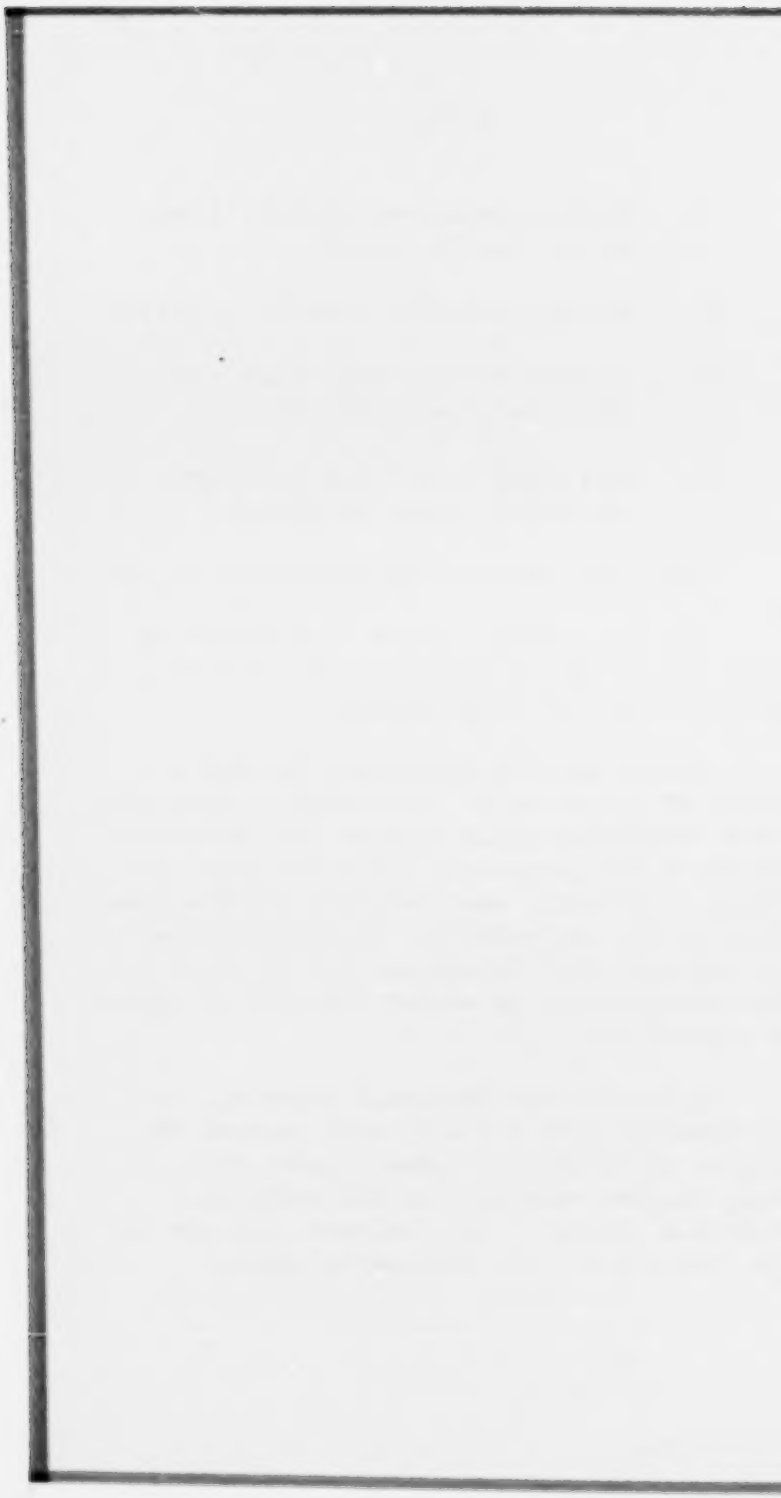
8. New Hope Guild for Retarded Children over 15 years.

Admitted larceny in excess of $1,500.

Larceny arose out of "reliance" on Medicaid to check overpayments and on carelessness in bookkeeping.

During period involved, he had a staff of 23 persons, including 5 dentists. These dentists often signed the Medicaid vouchers for payments. One of them, Dr. Henry Goldstein, was indicted at the same time as the defendant. On information and belief, Dr. Goldstein got a bonus of 10% commissions on about $38,000 on cases he signed for.

Vouchers for Medicaid payment, on information and belief, were signed by others in Goldman's name, particularly when Goldman was not in the country. (See D.A. file). Dr. Goldman was out of the country on the following dates:



May 8 to July 20, 1968
February 1 to February 28, 1969
August 1 to September 10, 1969
March 16 to March 23, 1970
June 29 to July 20, 1970
December 22, 1970 to January 2, 1971.

When Medicaid found an overpayment, they notified Goldman and he promptly refunded same, e.g., August 5, 1970, in the sum of $878.00.

There was a tendency to rely on Medicaid for checking overpayments induced by:

a. Intricate forms that Medicaid dentists had to fill out;

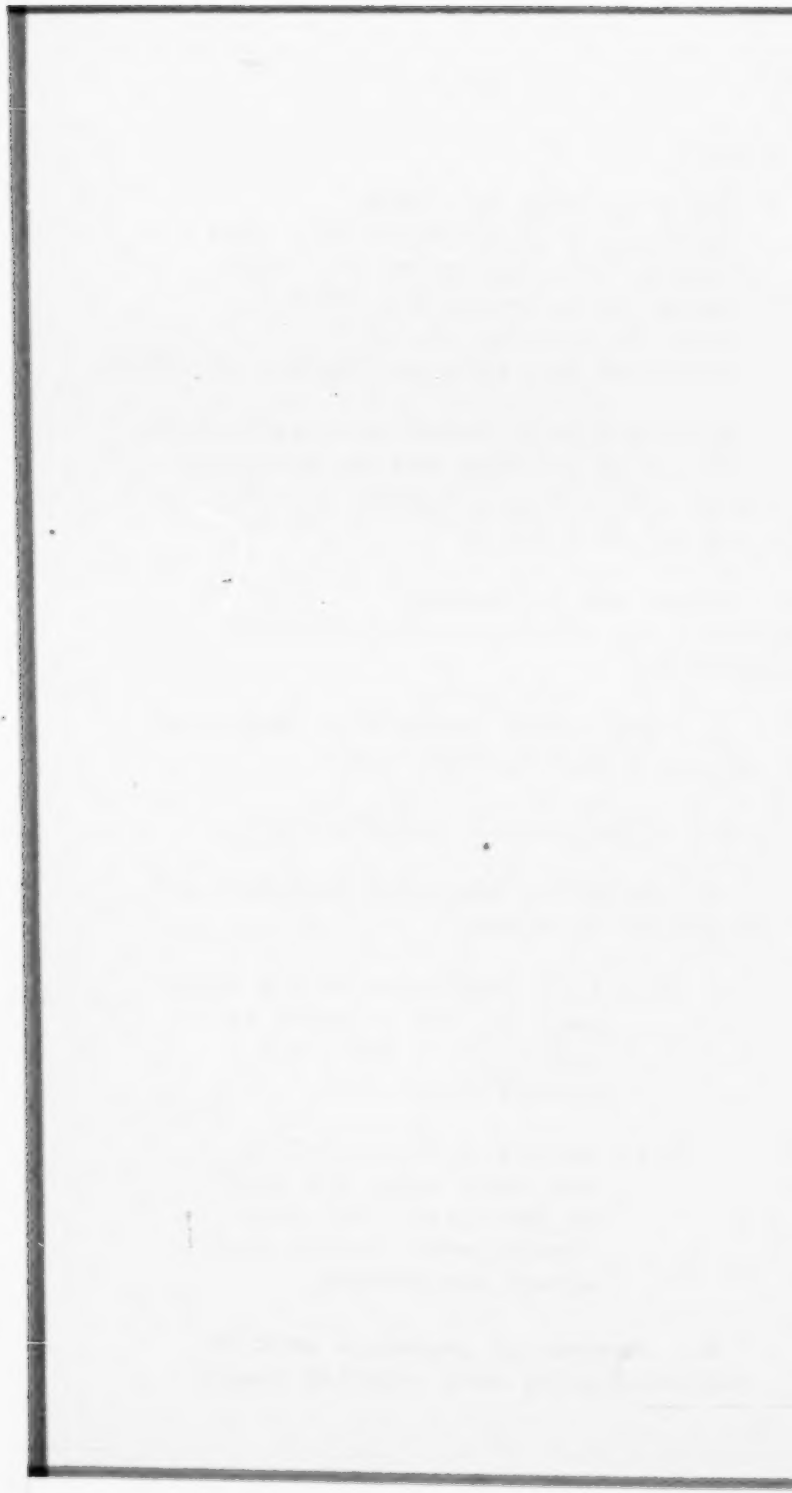
b. Complicated instructions;

c. Delay in Medicaid payments of 6 months or more:

(i) Thus duplicate bills were sent in for payment as required by Medicaid regulations; and

(ii) Unpaid vouchers after one year were not paid by Medicaid, and were "dead" even though the money was earned.

d. Roster of payments sent by Medicaid with many similar names;



e. Patients using Medicaid cards of others. No accurate identification cards were issued by Medicaid (now corrected by Medicaid), and

f. Many patients failed or refused to pick up dentures.

On information and belief, during period involved Goldman paid income taxes, federal, state and city, on Medicaid income of about $240,000.

Medicaid, he claims, still owes him about $40,000 for unpaid work.

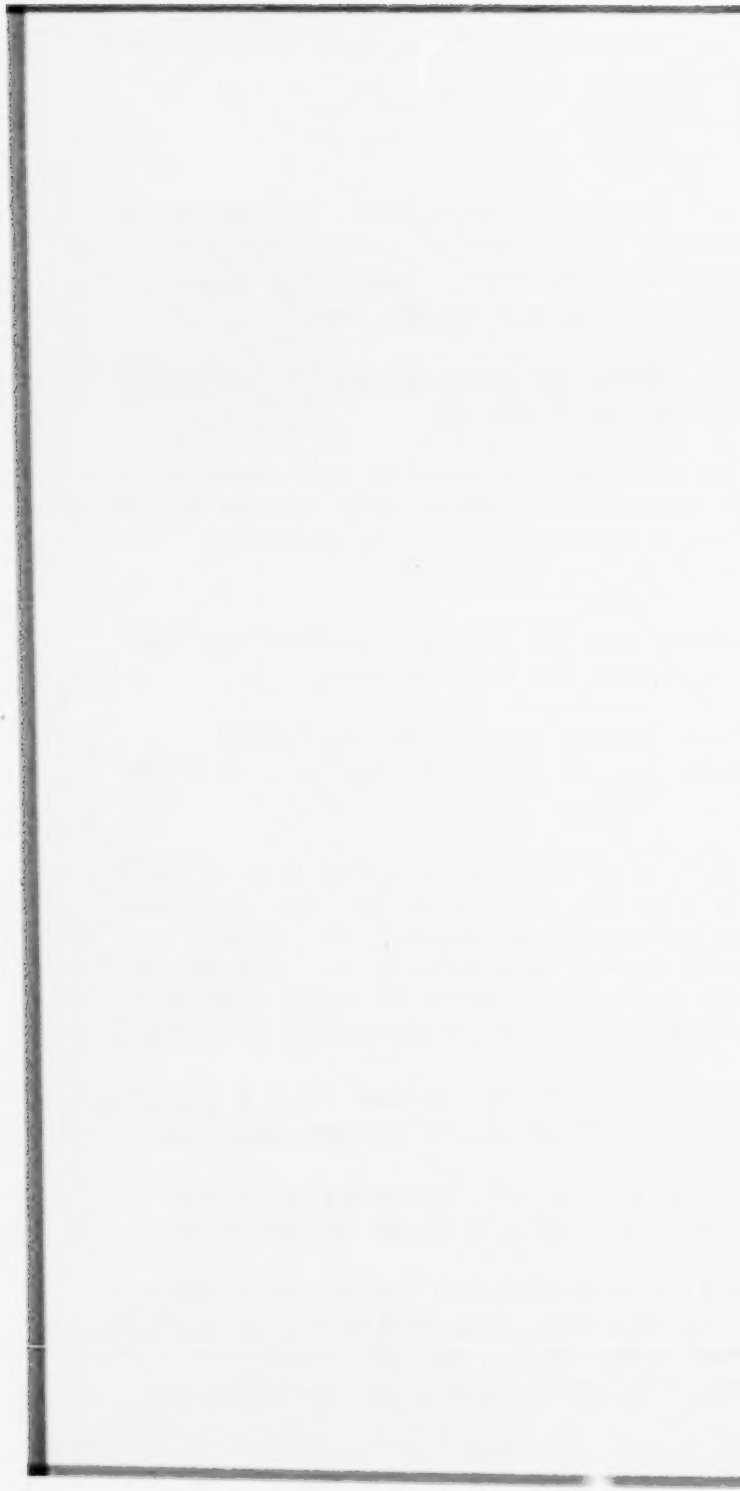
His income other than Medicaid averaged $4,500 per year for period 1968-1971.

Medicaid has blacklisted him to such extent that he is unable to rent any part of his office to a dentist who does Medicaid work. His office is located in an area where this type of work predominates. Thus, he is financially stymied.

His wife has an income from a pension of $6,000, 37% of which is non-taxable.

By his plea of guilty he will undoubtedly lose his license to practice.

As to restitution, if no jail sentence is imposed, his family could scrape together some money, probably about $10,000. To this sum could be added an



amount of approximately $20,000 to be raised from a mortgage of his house which he has lived in for the past 26 years. Additionally, Medicaid is indebted to him for a large sum of money, for services rendered but unpaid, which moneys would be assigned back by Dr. Goldman. The total of these sums, I am informed, constitutes the maximum restitution possible by him.

In this connection, it should be noted again that Dr. Goldman has paid some $240,000 in income taxes on his Medicaid income.

Jail, at his age (66), would accomplish nothing. He is a ruined man.

s/ William E. Ringel
William E. Ringel, Attorney

AFFIDAVIT OF AUSTIN V. CAMPRIELLO
IN OPPOSITION TO MOTION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AUSTIN V. CAMPRIELLO, being duly sworn, deposes and says:

I am an Assistant District Attorney in New York County assigned to the Rackets Bureau and am fully familiar with the facts of the above-captioned matter.

STATEMENT OF FACTS

A. Chronology of Court Appearances

1. The defendant, a dentist, was charged on April 28, 1972, in a 124 count indictment with the crimes of Grand Larceny in the Second and Third Degrees and Offering a False Instrument for Filing in the First Degree. The indictment alleges that during a four year period, the defendant stole $278,651.40 from the Department of Social Services and the City of New York.

2. On May 5, 1972, the defendant pleaded not guilty to the aforementioned charges.

3. On October 19, 1972, the defendant withdrew his previously entered plea of not guilty and entered a plea of guilty to the crime of Grand Larceny in the Second Degree under the first count of the indictment in satisfaction of the

entire indictment. The Honorable Frank Blangiardo, Acting Justice of the Supreme Court, accepted the defendant's guilty plea. [A transcript of the Proceeding is affixed hereto as Exhibit A].

4. The Court initially set November 27, 1972 as the date for sentence. The defense requested a later date and sentencing was set down for December 11, 1972. On that date, and with no prior notice to the People, the defendant moved for a pre-sentence conference. That motion was granted, and the conference was scheduled for December 15, 1972.

5. On December 15, 1972, Justice Blangiardo was reported ill, and consequently the conference was rescheduled for December 19, 1972.

6. Justice Blangiardo reportedly continued to be indisposed due to illness and the conference was rescheduled for December 27, 1972.

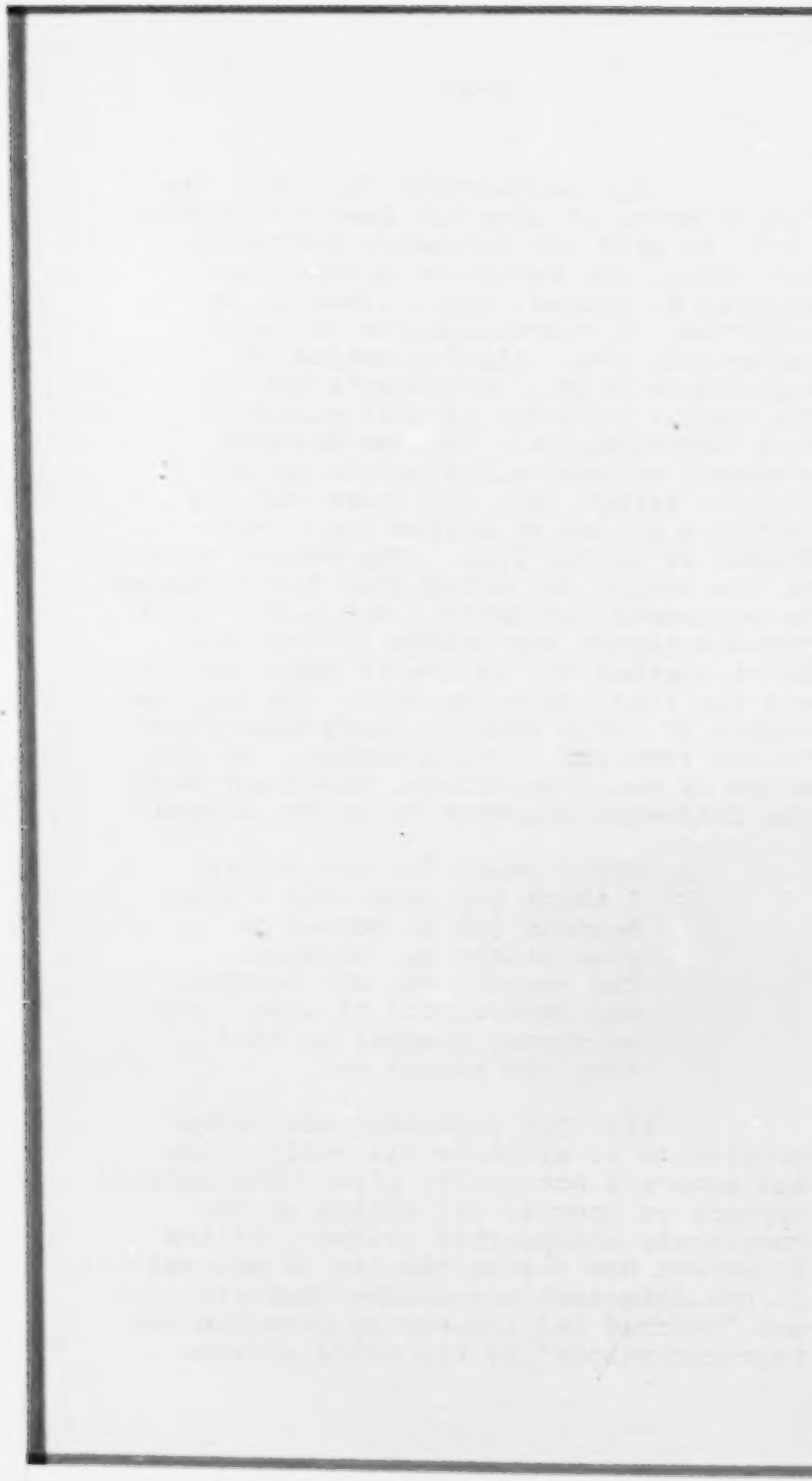
7. On December 27, 1972, a presentence conference was held in Justice Blangiardo's chambers. Representatives of the Probation Department, Health Department, and Corporation Counsel, attended, as did defense counsel, Justice Blangiardo and the deponent. The People at that time took no position on restitution, insisting that restitution was a matter for the Court to determine and opposed any lengthy adjournment. The case was set down for January 16, 1973, for sentencing.

8. Shortly before the adjourned date, I was advised via the telephone by the Court that, in my absence and at the defendant's request, the sentence had been adjourned until February 28, 1973. The court emphatically stated that no more adjournments would be granted, and that February 28, 1973 was the final sentencing date.

9. On February 28, 1973, the People were, as they had been for months, ready to have the defendant sentenced. Amazingly, the defendant's attorney, William E. Ringel, Esq., asked to be relieved. A representative of Jacob Lefkowitz, Esq., filed a Notice of Appearance on Mr. Lefkowitz's behalf. The People objected to this eleventh hour substitution. The new defense counsel, without prior notice to the People, served upon the Court and the People a Notice of Motion for a withdrawal of Guilty Plea. The People objected to the motion and moved that the defendant be sentenced forthwith. Mr. Lefkowitz's representative was unable to tell the Court whether Mr. Lefkowitz knew that this was the final sentence date. He was also unable to state when Mr. Lefkowitz first became involved in this matter. At the close of the proceedings, the Court made the following observation to Mr. Ringel:

> May I state for the record I think you have done a tremendous job on behalf of your client Mr. Goldman. The reasons why Mr. Goldman may have wished to substitute or change counsel at this time are beyond me.

10. The defendant now seeks permission to withdraw his guilty plea and entere a not guilty plea. The defense appears to premise its motion on two completely unsupported claims: 1) the defendant now claims that he is not guilty; 2) the defendant now claims that his plea was "coerced and induced by promises and representations" by his prior defense



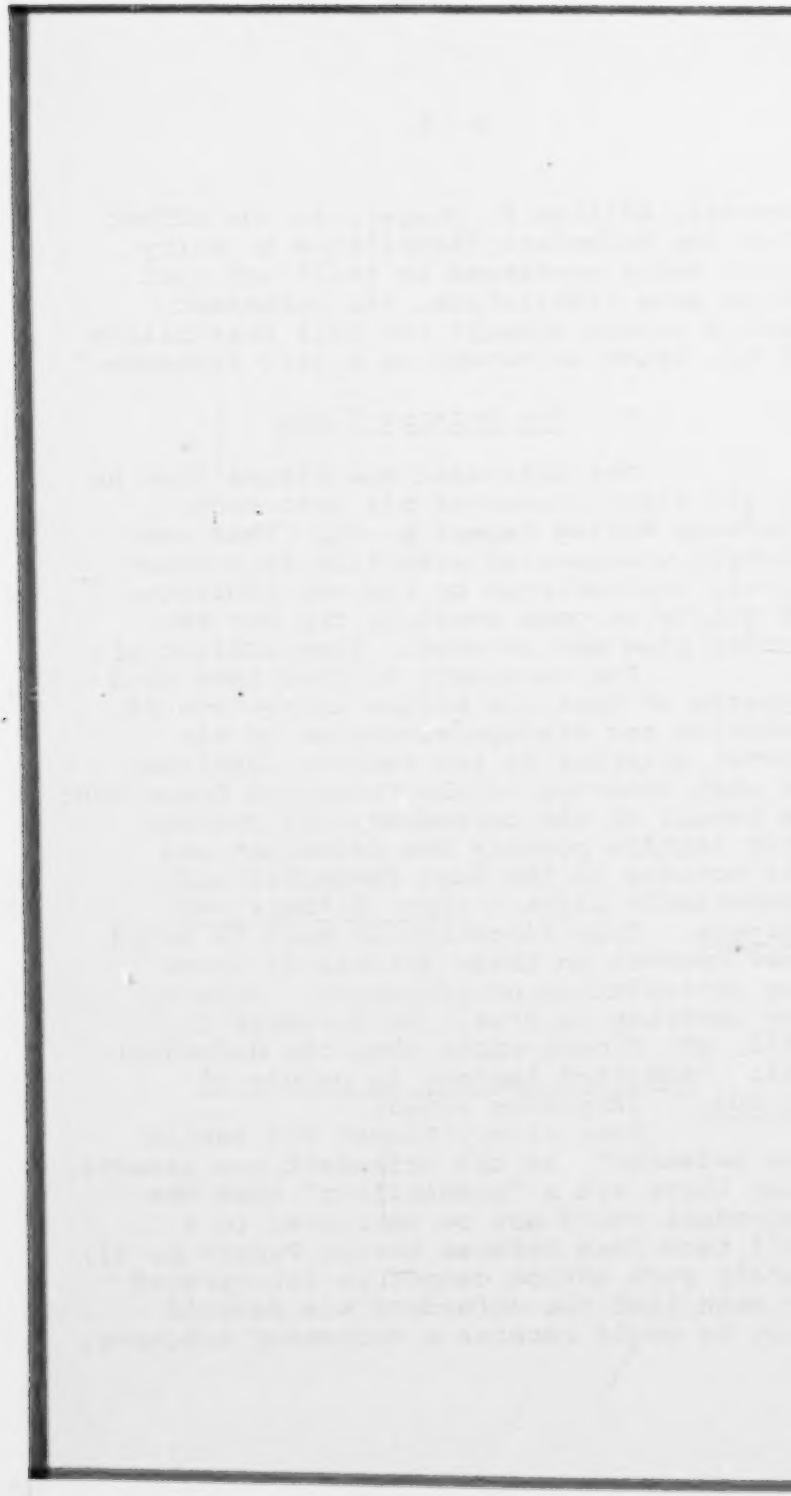
counsel, William E. Ringel, to the effect that the defendant "had little to worry about being sentenced to jail" and that if he made restitution, the defendant "would assure himself the full possibility of not being sentenced to a jail sentence."

B. The Defense Claim

The defendant now claims that he at all times protested his innocence. [Defense Moving Papers p. 3]. This completely unsupported assertion is conclusively contradicted by his own admission of guilty in open court on the day the guilty plea was entered. [See Exhibit A].

The defendant at this late date appears to rest his hollow allegation of coercion and misrepresentation by his former attorney on two letters submitted by that attorney to the Probation Department on behalf of the defendant. Of course, both letters portray the defendant and his actions in the most favorable and sympathetic light - that is their very purpose. Significantly, it must be noted that nowhere in these letters is there any protestation of innocence. Rather, the contrary is true. On November 15, 1972, Mr. Ringel wrote that the defendant had: "Admitted larceny in excess of $1,500." [Emphasis added].

Even if Mr. Ringel did advise the defendant, as the defendant now asserts, that there was a "possibility" that the defendant would not be sentenced to a jail term [see Defense Moving Papers p. 2], surely such advice cannot be interpreted to mean that the defendant was assured that he would receive a suspended sentence.



Finally, the court need not speculate as to what advice Mr. Ringel gave the defendant concerning any sentence in this matter. By a letter dated March 1, 1973, addressed to Alfred J. Scotti, Chief Assistant District Attorney, a copy of which is affixed and attached hereto as Exhibit B, Mr. Ringel stated:

> This is to advise you that I personally, and other members of the firm of Delson & Gordon, spent many hours during the past year discussing with the defendant the details of the above indictment. During that time and specifically before plea of guilty was entered on October 19, 1972, he was fully advised of the ramification of pleading and was similarly advised that no commitments or promises could be made with regard to punishment or the amount of restitution required. [Emphasis added.]
>
> The defendant is a professional man of long-standing and, after being fully advised and stating repeatedly that he did not wish to go to trial, requested that he be allowed to plead guilty, as shown in the record.
>
> The matter of restitution was fully discussed with the defendant and he was advised

that in our opinion, appropriate restitution would act in mitigation of punishment.

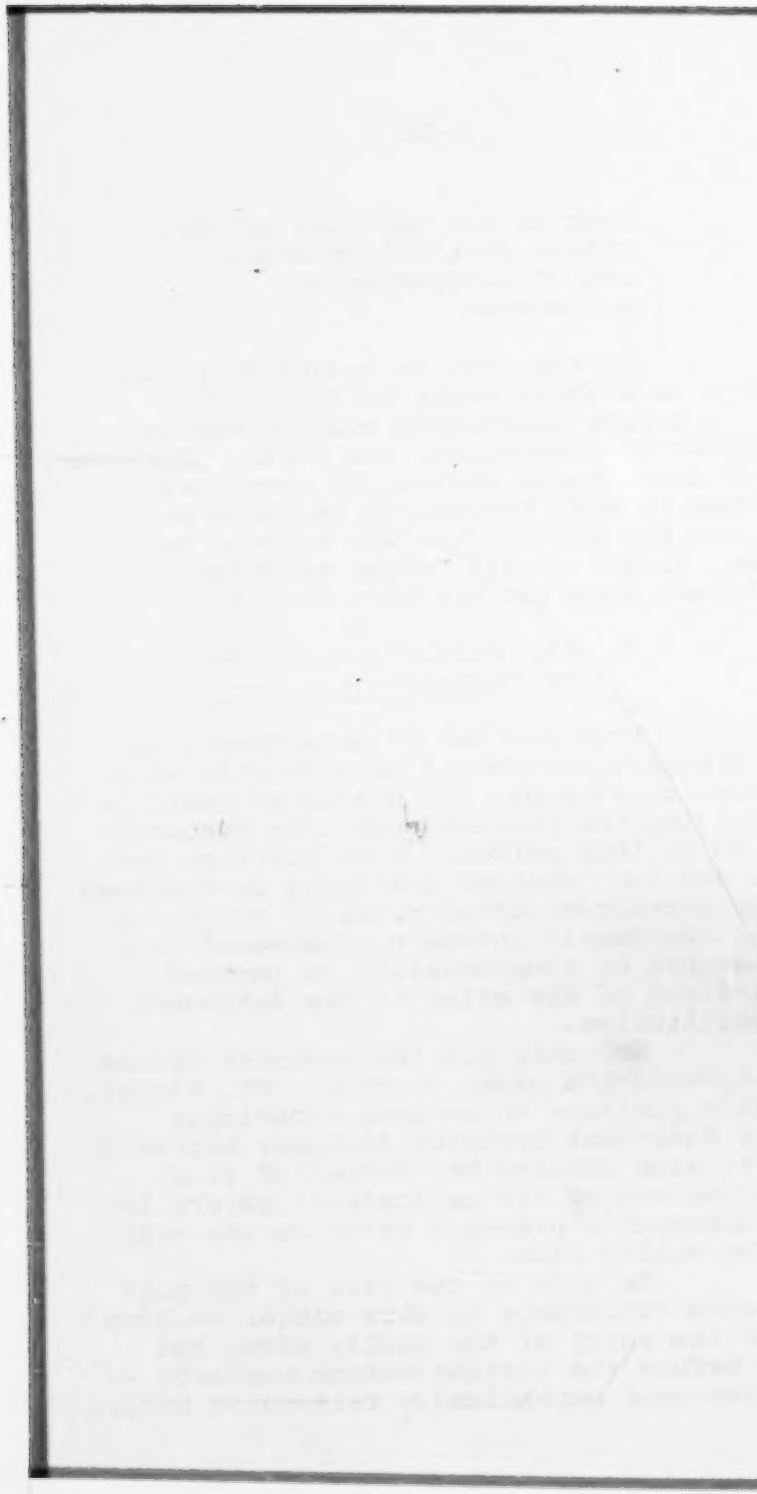
In sum, the defendant's instant motion is without basis in fact. The moving papers themselves contain merely unsupported assertions, not facts. Moreover, these last minute claims are completely refuted by what transpired in Court on the day the guilty plea was entered and by Mr. Ringel in his letter to Chief Assistant District Attorney Scotti.

C. The People's Position on Sentence

From the day of arraignment to the present, the People have maintained a single, consistent, and unaltered position concerning the People's sentence recommendation in this matter. That position has been and is: whether this case be disposed of by conviction after trial or by guilty plea, the People intend to recommend that a sentence of incarceration be imposed, regardless of any offer by the defendant of restitution.

Not only did the deponent advise the defendant's prior attorney, Mr. Ringel, of this position on several occasions; Chief Assistant District Attorney Alfred J. Scotti also advised Mr. Ringel of this position and of its unalterable nature in the deponent's presence prior to the entry of the guilty plea.

As late as the date of the presentence conference in this matter -- long after the entry of the guilty plea, and long before the instant motion was made -- the deponent emphatically reiterated before



all those present at that conference that the People would recommend the imposition of a sentence of incarceration regardless of any offer or effort to make resitution by this defendant.

In addition, this Court does not need to be reminded that the Court itself consistently refused to make any representation to Mr. Ringel or to the defendant as to what sentence it intended to impose in this matter.

Moreover, Mr. Ringel in his letter to Chief Assistant District Attorney Scotti makes emphatically clear that Mr. Ringel advised the defendant "that no commitments or promises could be made with regard to punishment or the amount of restitution required" [see Exhibit B].

Finally, on the day of sentence, the following transpired in open court:

THE COURT: By so pleading. And are you also indicating, sir, you are doing this freely and willingly, and without any reservations of any kind?

THE DEFENDANT: Yes.

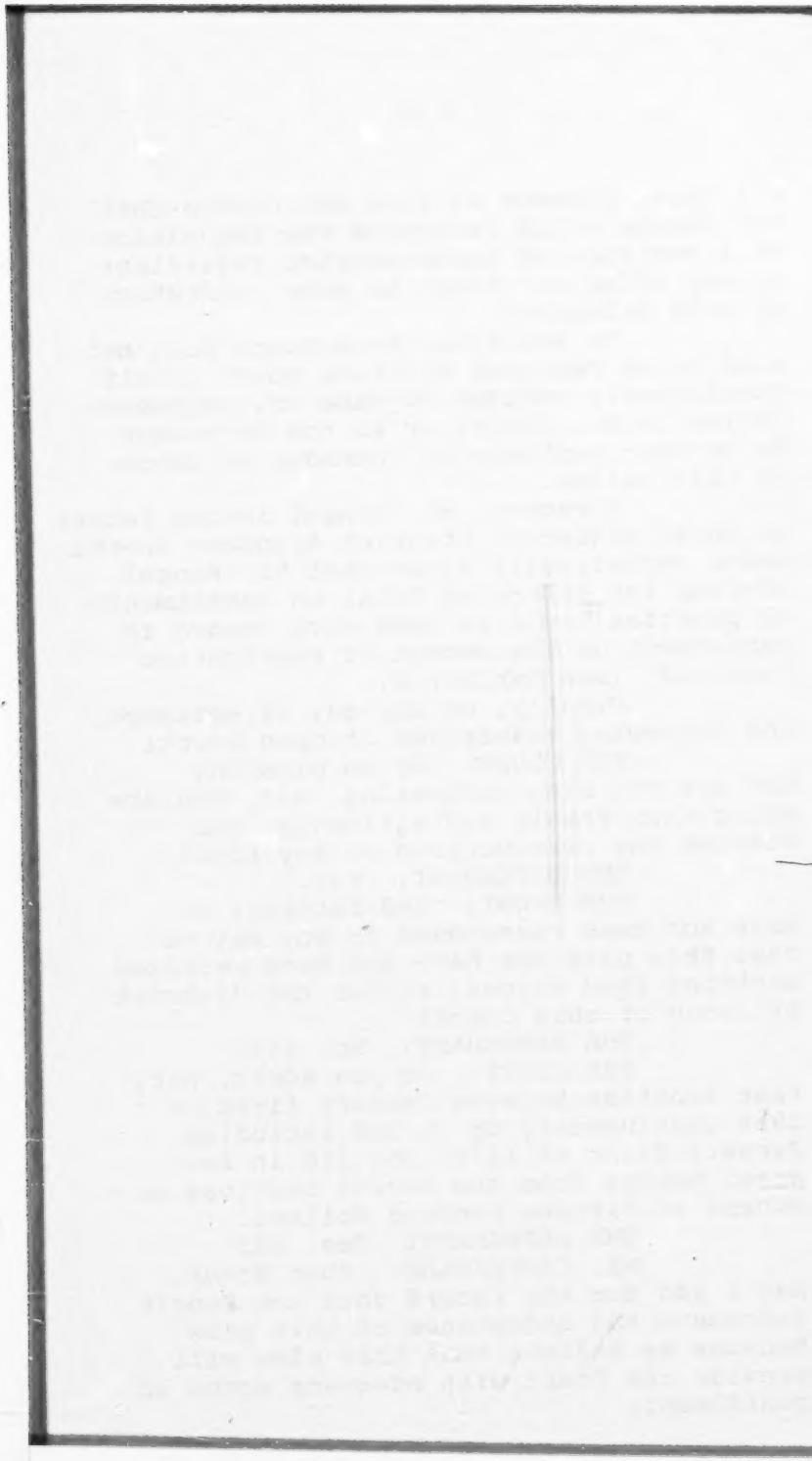
THE COURT: And further, you have not been threatened in any way to take this plea nor have you been promised anything from anyone, either the district attorney or this Court?

THE DEFENDANT: No, sir.

THE COURT: Do you admit, sir, that sometime between January first of 1968 continuously up to and including January first of 1972, you did in fact steal moneys from the Social Services in excess of fifteen hundred dollars:

THE DEFENDANT: Yes, sir.

MR. CAMPRIELLO: Your Honor, may I add for the record that the People recommend the acceptance of this plea because we believe that this plea will provide the Court with adequate scope of punishment.



In short, the defense and the defendant himself could not have failed to grasp three points: first, that the People considered restitution a matter to be determined by the Court and the People would take no position on it; second, that regardless of what happened in terms of restitution, the People nevertheless intended to recommend to the sentencing judge that this defendant be sentenced to a jail term; and third, that the Court itself refused to make any commitment as to what its sentence would be.

D. The Entry of the Guilty Plea

The events which transpired in court on October 19, 1972, when the defendant entered his plea of guilty, belie the defendant's present claim that he is innocent and that the plea was induced by his prior attorney's representations and promises as to what the Court's sentence would be. [See Exhibit A].

This defendant was afforded every safeguard the law allows prior to the acceptance by the Court of his guilty plea. Upon being questioned by the Court, the defendant admitted that between on or about January 1, 1968 and January 1, 1972, he stole a sum of money in excess of $1500 from the Department of Social Services. The defendant stated that the plea was being made without reservation, voluntarily and knowingly and after consultation with counsel. The defendant admitted realizing that by pleading guilty he was giving up his right to trial by jury. Significantly, the defendant made no protestation of innocence.

Most importantly, and contrary to his present assertions, the defendant upon being questioned by the court responded as follows:

THE COURT: And further, you have not been threatened in any way to take this plea nor have your been promised anything from anyone, either the district attorney or this Court?

THE DEFENDANT: No, sir.

Today, the defendant asserts that his former counsel, Mr. Ringel, coerced and induced the plea by suggesting that Mr. Ringel made representations as to what the Court's sentence would be. On that day the guilty plea was entered, however, the following transpired after the Court concluded its questioning of the defendant:

MR. RINGEL: May I also say something, your Honor, at this point. Doctor, there has been no promise made to you by your attorney or indication as to what would happen with respect to this sentence, is that right, Doctor?

THE DEFENDANT: Yes, sir.

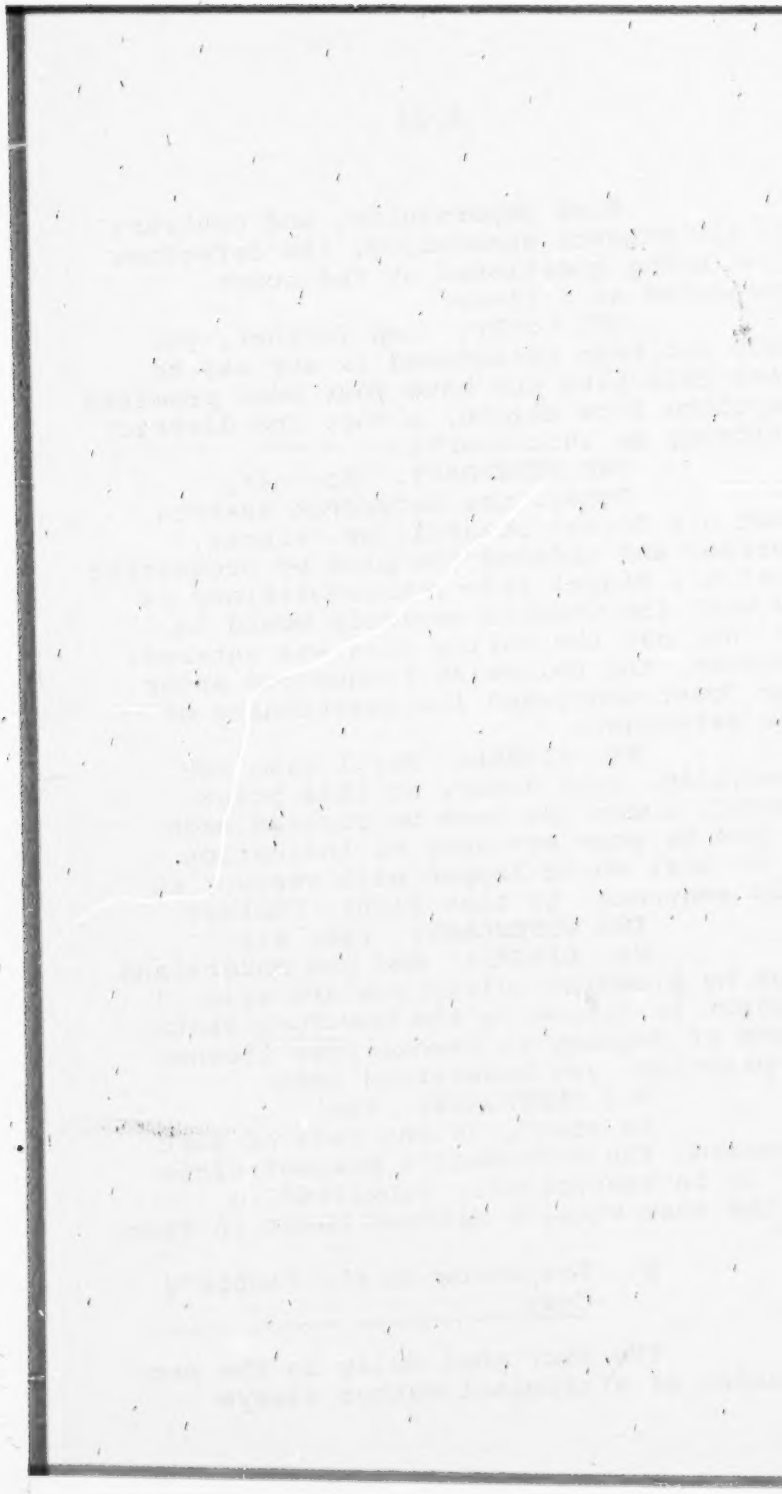
MR. RINGEL: And you understand that by pleading guilty you are also subject to action by the New York State Board of Regents to revoke your license to practice, you understand that.

THE DEFENDANT: Yes.

In short, in the face of such a record, the defendant's present claim is, it is respectfully submitted, a hollow sham utterly without basis in fact.

E. Prejudice to the People's Case

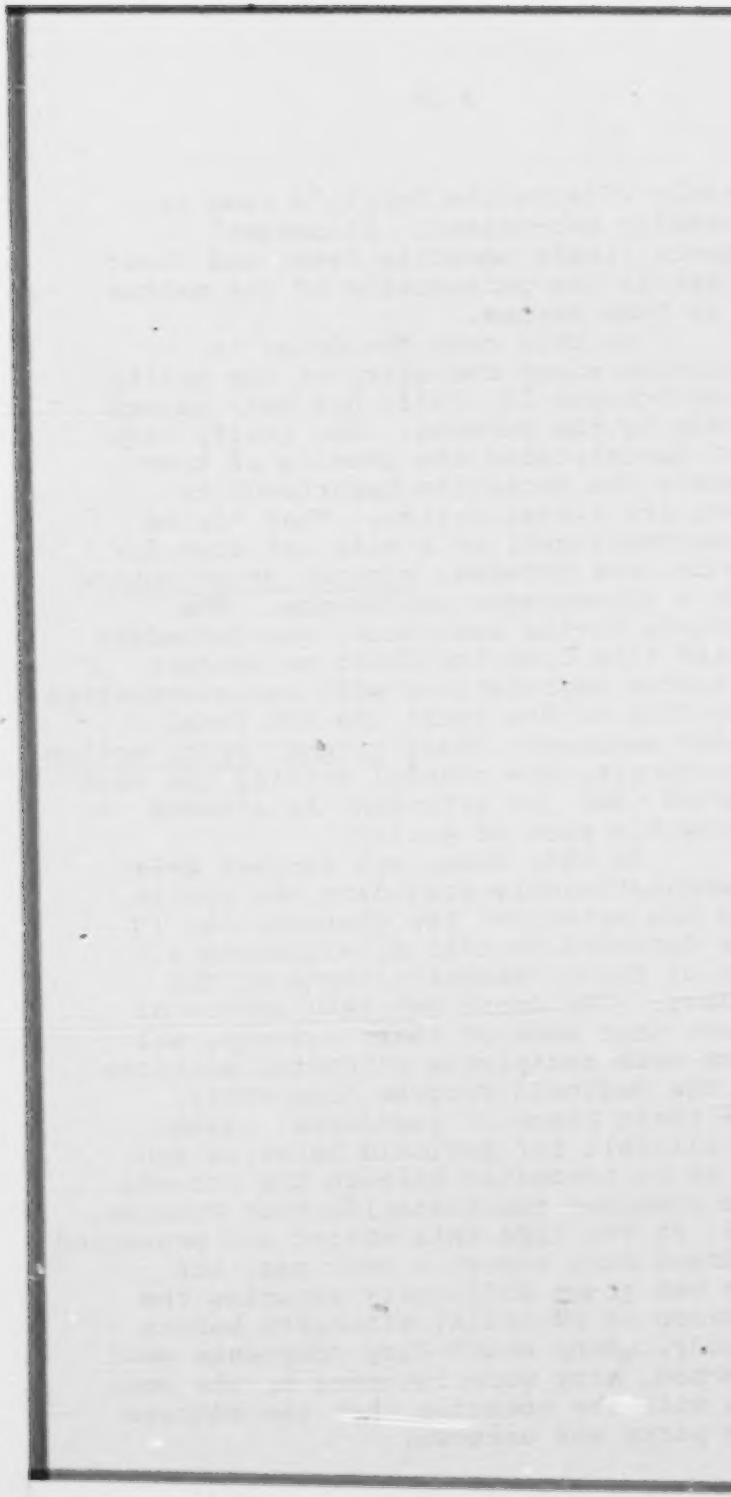
The fact that delay in the prosecution of a criminal matter always



adversely effects the People's case is universally recognized. Witnesses' disappear, their memories fade, and their interest in the prosecution of the matter dims as time passes.

In this case the delay in prosecution since the entry of the guilty plea on October 19, 1972, has been caused entirely by the defense. The guilty plea itself necessitated the passing of time to enable the Probation Department to conduct its investigation. That having been accomplished, on a date set down for sentence, the defense, without prior notice sought a presentence conference. The conference having been held, the defendant obtained time from the Court to conduct restitution negotiations with representatives of the City of New York. On the final date for sentence, again without prior notice to the People, new counsel entered the case and moved that the defendant be allowed to withdraw his plea of guilty.

In this case, any further delay will unquestionably prejudice the People. Due to the nature of the charges, the People intended to call as witnesses a number of former dental clients of the defendant. The Court may take notice of the fact that some of these clients, all of whom were recipients of dental services under the Medicaid Program frequently change their place of residence, cease to be eligible for Medicaid benefits and, cease to be traceable through the records of the agencies administering that Program. Indeed, at the time this matter was presented to a Grand Jury almost a year ago, the People had great difficulty securing the attendance of potential witnesses before that body. Many Grand Jury subpoenas went unanswered, many were returned by the post office with the notation that the address of the party was unknown.



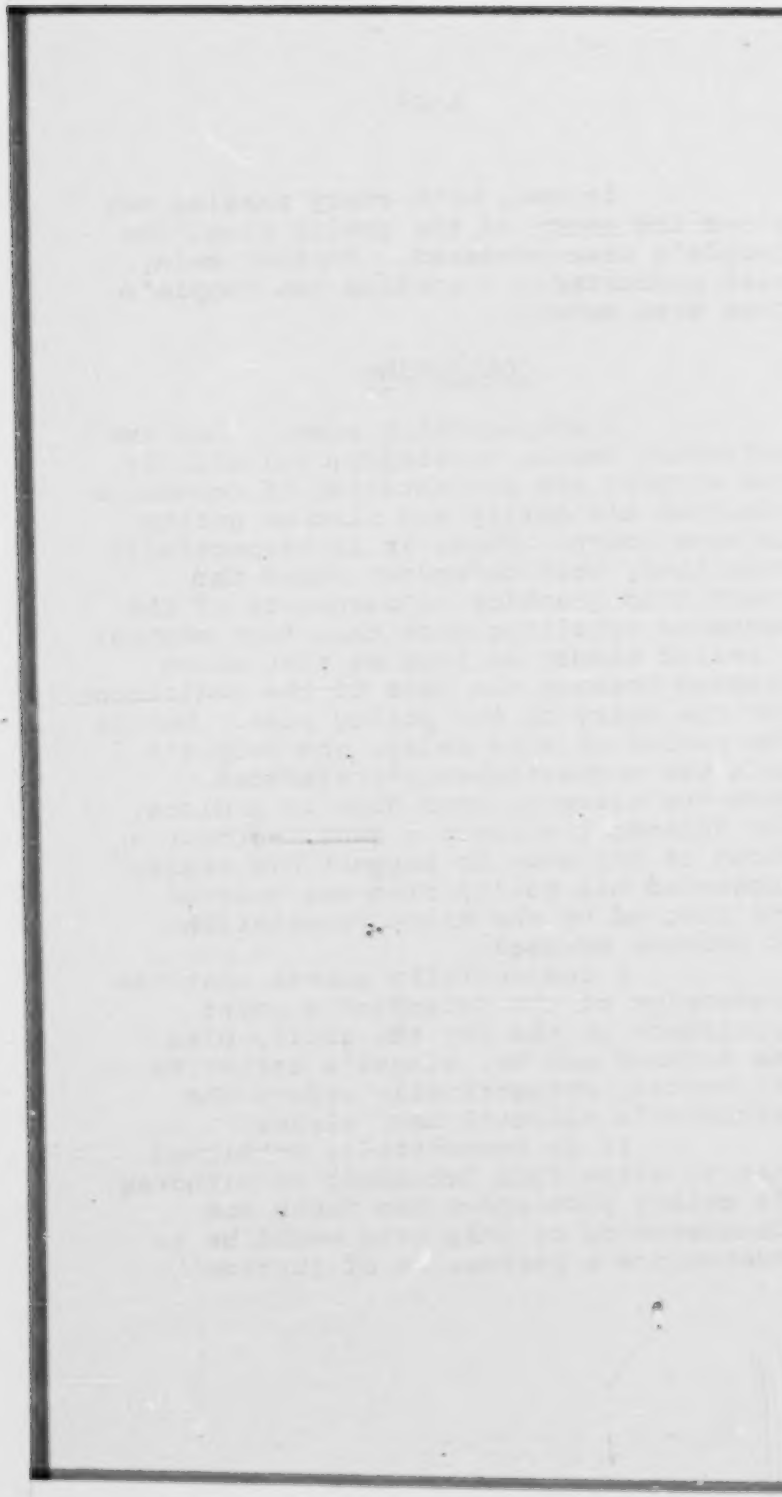
In sum, with every passing day since the entry of the guilty plea, the People's case weakened. Further delay will undoubtedly prejudice the People's case even more.

CONCLUSION

I respectfully submit that the defendant herein knowingly, voluntarily, and without any protestation of innocence admitted his guilty and pleaded guilty in open court. Then, it is respectfully submitted, this defendant duped the Court into granting adjournments of the sentence totalling more than four months, a period almost as long as that which elapsed between the date of the indictment and the entry of the guilty plea. During the period of this delay, the People's case was unquestionably prejudiced. When the eleventh hour drew to a close, the defendant without a fact, without a shred of evidence to support his claim, suggested his guilty plea was coerced and induced by the misrepresentations of defense counsel.

I respectfully submit that the transcript of the defendant's court appearance on the day the guilty plea was entered and Mr. Ringel's letter to Mr. Scotti, categorically refute the defendant's eleventh hour claims.

It is respectfully submitted that to allow this defendant to withdraw his guilty plea under the facts and circumstances of this case would be to countenance a perversion of justice.



WHEREFORE, it is respectfully submitted for the reasons stated herein and in the affixed and attached Memorandum of Law, the defendant's motion must and should in all respects be denied.

s/ Austin V. Campriello

[Duly sworn to
March 2, 1973.]

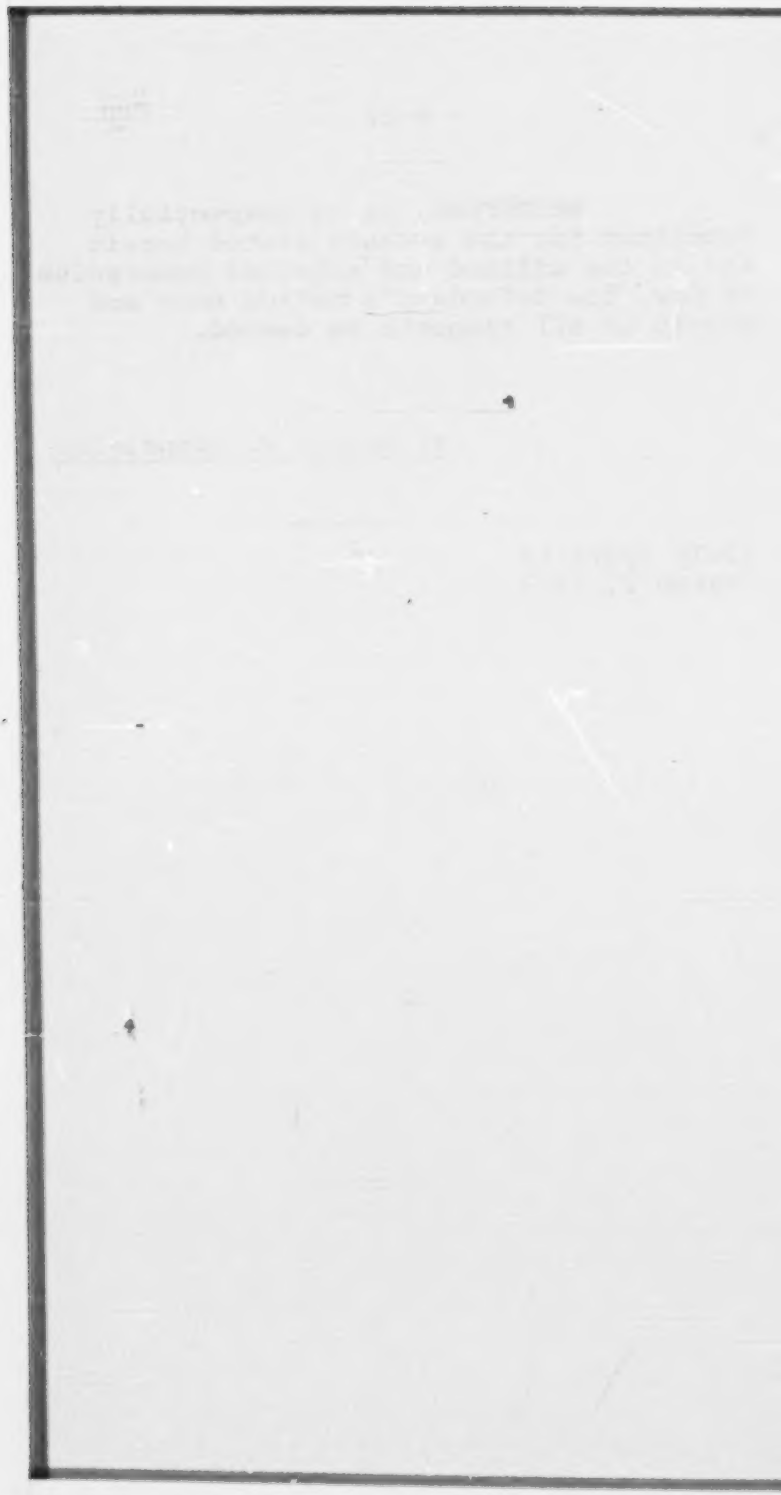


EXHIBIT A - MINUTES OF PLEA - ANNEXED TO AFFIDAVIT IN OPPOSITION

SUPREME COURT: NEW YORK COUNTY

----------x

THE PEOPLE OF THE STATE OF NEW YORK

vs. 2163-72

WILLIAM GOLDMAN,

Defendant.

----------x

New York, N.Y.
October 19, 1972

B E F O R E: HON. FRANK J. BLANGIARDO,
Justice.

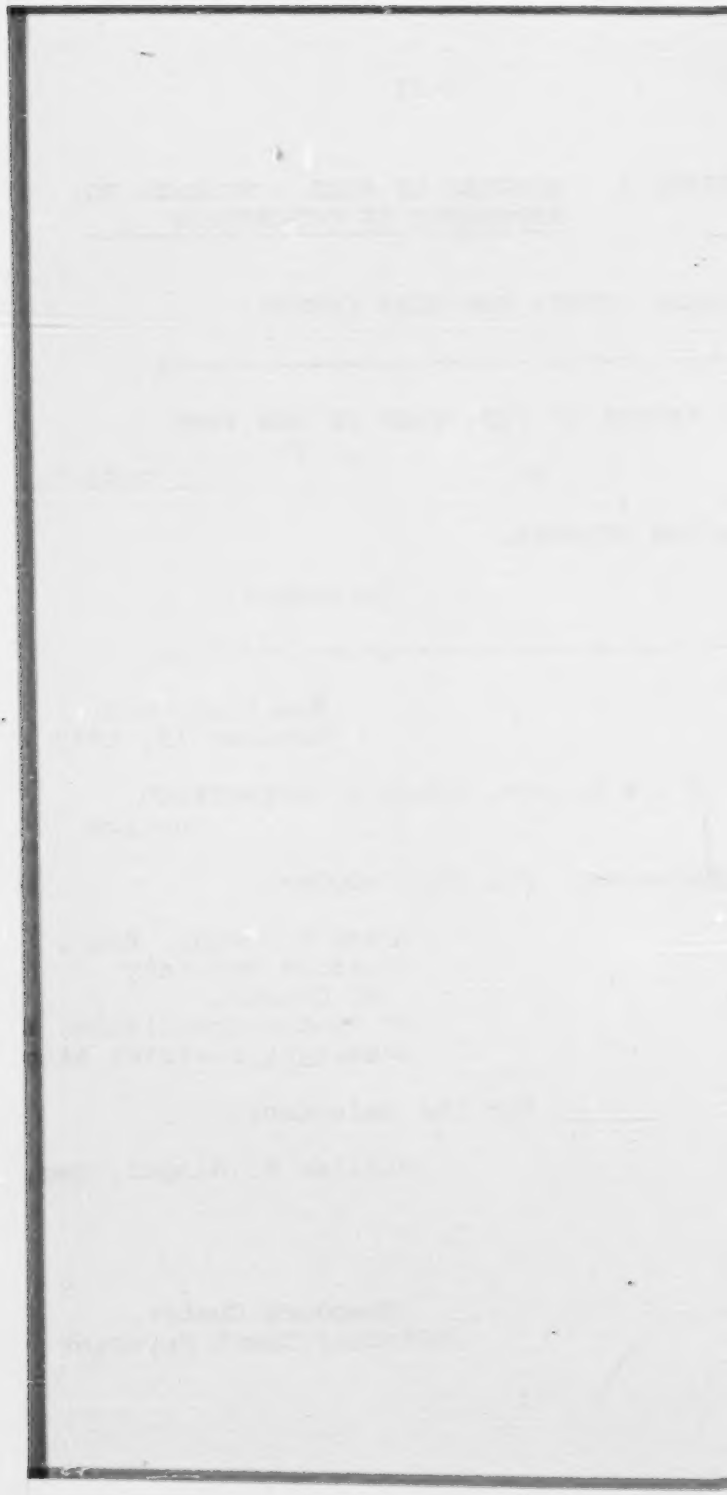
Appearances: For the People:

Frank S. Hogan, Esq.,
District Attorney
NY County,
BY Austin Campriello, Esq.
Assistant District Attorney.

For the Defendant:

William E. Ringel, Esq.

Theodore Custer,
Official Court Reporter



Colloquy

THE COURT CLERK: People against William Goldman.

MR. RINGEL: At this time, your Honor, the defendant offers to plead guilty to the first count of the indictment to cover all counts in the indictment, the plea only to the extent that he admits stealing a sum in excess of fifteen hundred dollars.

MR. CAMPRIELLO: Your Honor, for the record, there is a dispute as to the precise amounts stolen by this defendant. The People recommend the acceptance of this plea, and the People will make known at the appropriate time to the Probation Department the basis for the People's computation of the precise amount stolen.

THE COURT: First count of the indictment?

MR. CAMPRIELLO: The first count of the indictment charges that the defendant - grand larceny in the second degree, your Honor, and it charges that the defendant in the county of New York from on or about January 1, 1968, continuously to on or about January 1, 1972 stole property from the Department of Social Services in the city of New York having an aggregate value in excess of fifteen hundred dollars, that property being money, your Honor.

THE COURT: Your name is William Goldman?

THE DEFENDANT: That's right.

THE COURT: Mr. Goldman, you have spoken to your attorney, have you not?

THE DEFENDANT: Yes.

THE COURT: Do you understand that your attorney has now indicated that you wish to change your plea from not guilty to guilty, and you wish to plead guilty to the crime of grand larceny in the second defree, which is the first count in the indictment, to cover the entire indictment under Number 2163 of 1972, is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And you understand, sir, that you are waiving your right to a jury trial?

THE DEFENDANT: Yes, sir.

THE COURT: By so pleading. And are you also indicating, sir, you are doing this freely and willingly, and without any reservations of any kind?

THE DEFENDANT: Yes.

THE COURT: And further, you have not been threatened in any way to take this plea nor have you been promised anything from anyone, either the district attorney or this Court?

THE DEFENDANT: No, sir.

Colloquy

THE COURT: Do you admit, sir, that sometime between January first of 1968 continuously up to and including January first of 1972, you did in fact steal moneys from the Social Services in excess of fifteen hundred dollars?

THE DEFENDANT: Yes, sir.

MR. CAMPRIELLO: Your Honor, may I add for the record that the People recommend the acceptance of this plea because we believe that this plea will provide the Court with adequate scope of punishment.

MR. RINGEL: May I also say something, your Honor, at this point. Doctore, there has been no promise made to you by your attorney or indication as to what would happen with respect to this sentence, is that right, Doctor?

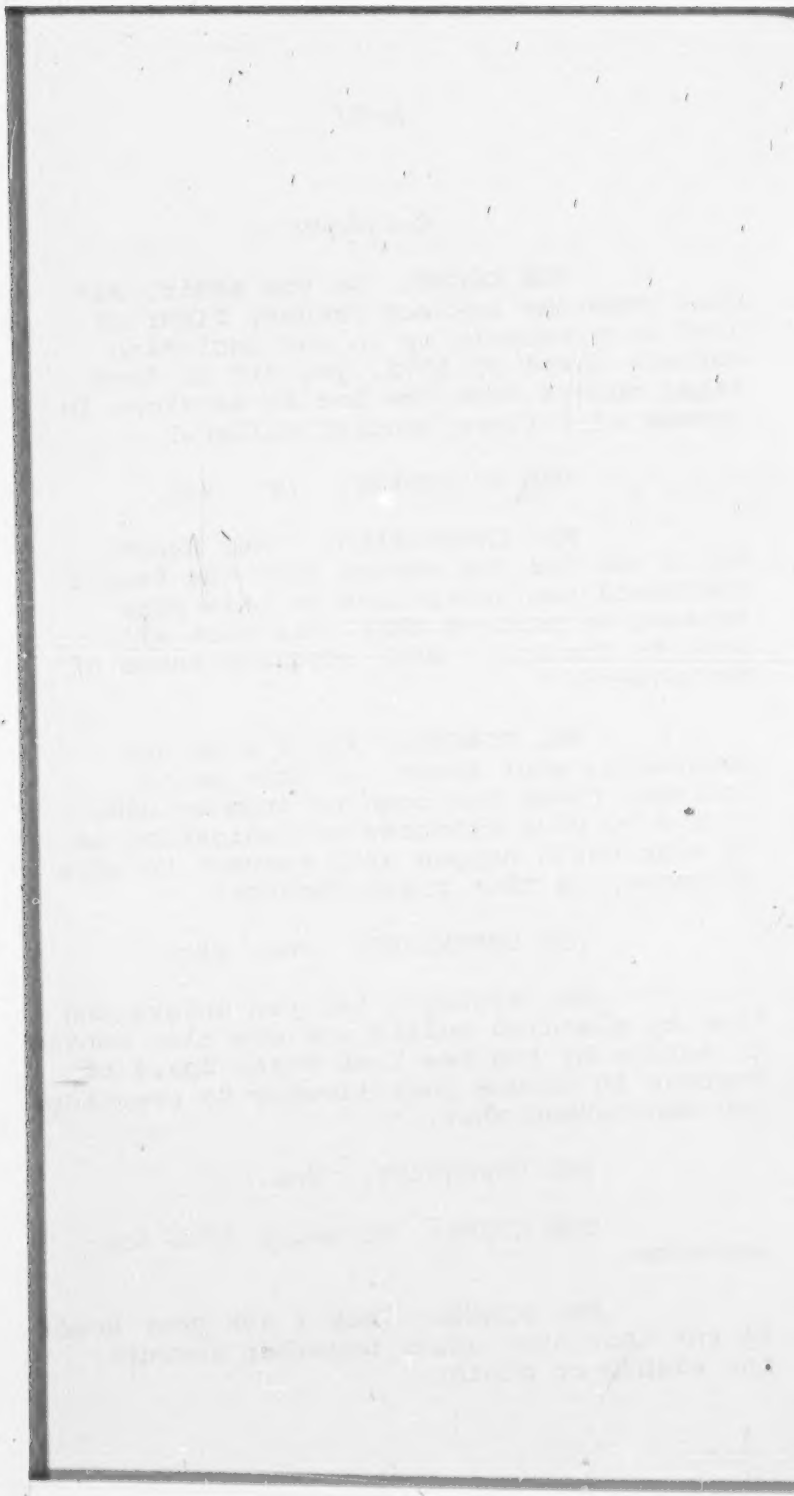
THE DEFENDANT: Yes, sir.

MR. RINGEL: And you understand that by pleading guilty you are also subject to action by the New York State Board of Regents to revoke your license to practice, you understand that.

THE DEFENDANT: Yes.

THE COURT: November 27th for sentence.

MR. RINGEL: May I ask your Honor to put that over after December seventh; the eighth or ninth.



Colloquy

THE COURT: Before we do that, Mr. Clerk, you will accept the plea.

THE COURT CLERK: Mr. Goldman, Mr. Ringel, your attorney present at your side?

THE DEFENDANT: Yes.

THE COURT CLERK: Do you now withdraw your not guilty plea heretofore entered to indictment Number 2163 of 1972, do you now wish to enter a plea of guilty to the charge of grand larceny in the second degree under the first count of this information and under this indictment, said plea to cover that indictment, is that your plea?

THE DEFENDANT: Yes.

THE COURT CLERK: Date for sentence, your Honor

THE COURT: It is agreed December seventh.

MR. RINGEL: I would like after the eighth of the ninth. I don't expect to be in town -

THE COURT: Any date you want. December eleventh

MR. RINGEL: Eleventh fine, okay.

THE COURT: December eleventh for sentence.

Colloquy

MR. RINGEL: Parole continued.

THE COURT: Parole continued.

Certified, that the foregoing is a true and correct transcript of the minutes.

s/ Theodore Custer
Theodore Custer,
Official Court Reporter

EXHIBIT B - LETTER DATED MARCH 1, 1973 - ANNEXED TO AFFIDAVIT IN OPPOSITION

Law Offices

D E L S O N & G O R D O N
230 Park Avenue
New York, N.Y. 10017

March 1, 1973

Frank S. Hogan, Esq.
100 Centre Street
New York, New York

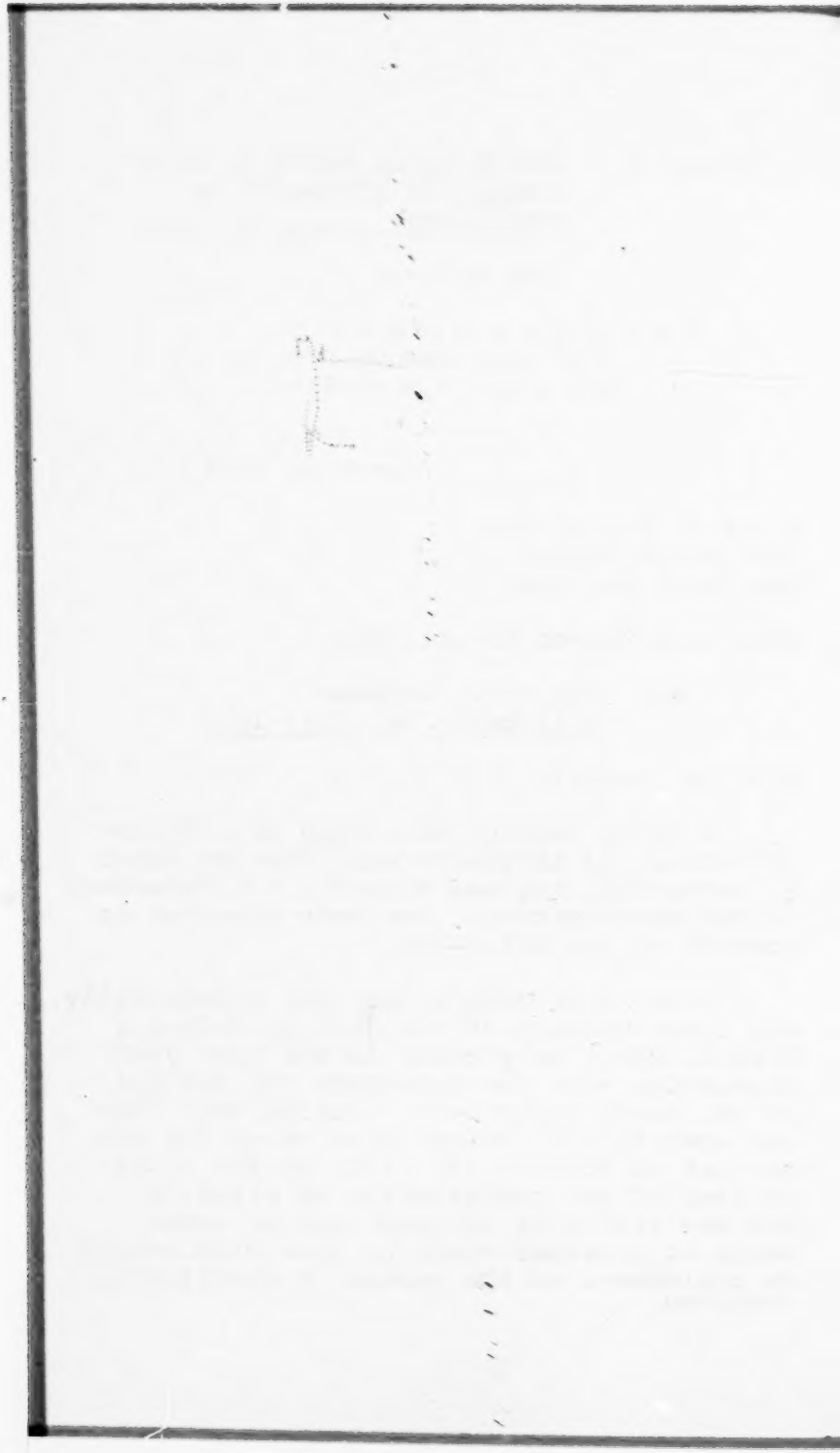
Attention Alfred Scotti, Esq.

Re: People v. Goldman
Indictment No. 2163-1972

Dear Mr. Scotti:

I am in receipt of a copy of a Notice of Motion and Affidavit submitted by Jacob P. Lefkowitz, the new attorney for defendant in the above matter. You have asked me to comment on the Affidavit.

This is to advise you that I personally, and other members of the firm of Delson & Gordon, spent many hours in the past year discussing with the defendant the details of the above indictment. During that time and specifically before plea of guilty was entered on October 19, 1972, he was fully advised of the ramification of pleading and was similarly advised that no commitments or promises could be made with regard to punishment or the amount of restitution required.



The defendant is a professional man of long-standing and, after being fully advised and stating repeatedly that he did not wish to go to trial, requested that he be allowed to plead guilty, as shown in the record.

The matter of restitution was fully discussed with the defendant and he was advised that in our opinion, appropriate restitution would act in mitigation of punishment.

Very truly yours,

s/ William E. Ringel
William E. Ringel

WER:lv

REPLY AFFIDAVIT OF
JACOB P. LEFKOWITZ

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JACOB P. LEFKOWITZ, being duly sworn, deposes and says:

1. I am an attorney at law duly licensed to practice in the State of New York.

2. I have been retained to represent the defendant in the above captioned prosecution and submit this affidavit in reply to the answering affidavit of Assistant District Attorney Austin V Campriello, dated March 2, 1972.

3. On the 14th day of February 1973, I had my first conference with the defendant herein. At that time the defendant and I had a full and complete discussion of all of the facts and circumstances of this case.

4. Based on the aforementioned discussion with the defendant, together with an examination of all the pertinent court records, and an assidious investigation of this entire matter, I have reached the following conclusions:

(a) The defendant herein has a good and meritious defense in law and in fact to each and all the counts contained in the instant indictment and does in fact claim that he is innocent of the charges

contained therein. (See affidavit of William Goldman, attached hereto and made a part hereof.)

(b) The plea of guilty which was entered herein was based on incomplete, inaccurate and misleading representations and assurances by the defendant's former counsel, William E. Ringel, Esq.

(c) The defendant has not engaged in any dilatory tactics and has in no way impeded or delayed the speedy disposition of this case.

5. In light of the foregoing, your deponent prepared the moving papers duly served and filed on February 28, 1973, wherein the relief sought is the withdrawal of the defendant's plea of guilty.

6. The aforementioned answering affidavit by Mr. Campriello and the exhibits attached hereto present new questions and issues pertaining to this motion. This affidavit is submitted in reply for the purpose of aiding the court in answering those questions and resolving all of the issues raised by this motion.

7. It is the people's contention that the plea herein was entered voluntarily by the defendant with his full knowledge of all of the possible consequences thereof.

(a) In support of that contention Mr. Campriello has submitted the transcript of the proceedings in court at the time of the taking of the plea. Mr. Campriello has also submitted an affidavit in support of his contention and in that affidavit at pages 6-7 states that <u>at all times</u> the Prosecution intended to request that an incarcerative sentence be imposed. A fair reading of the minutes, in conjunction with the affidavit by Mr. Campriello, lends credibility and weight to the defendant's

contention that he was led to believe that no incarcerative sentence would be imposed. The minutes show that Mr. Campriello stated the following: "Your Honor, may I add for the record that the people recommend the acceptance of this plea because we believe that this plea will provide the court with adequate scope of punishment." The record of the court proceedings at the time of the taking of the plea is barren of any statement by Mr. Campriello that it was his intention to ask for a incarcerative sentence. On the contrary, the record suggests that sentencing would be left entirely to the discretion of the court. A further reading of the transcript reflects that Mr. Ringel made a statement as follows: "May I also say something, your Honor, at this point? Doctor, there has been no promise made to you by your attorney or indication as to what would happen in respect to this sentence, is that right, doctor?" There is nothing in the foregoing that would suggest to the defendant that Mr. Ringel knew that Mr. Campriello was going to ask for the imposition of a jail sentence. The obvious questions which all of this raises is simply this: If Mr. Campriello and Mr. Ringel both knew that a jail sentence was going to be requested, why did they not say so at the time of the taking of the plea?

(b) The foregoing extracts from the minutes tend to indicate that Mr. Ringel kept the truth from the defendant. It is, of course, insufficient for the defendant to show that he was unaware that the assistant district attorney was going to request that a jail sentence be imposed. The defendant must show that he was mislead into believing that he was not exposing himself to the possibility of a jail sentence at the time of the taking of the plea.

8. The transcript of the court proceedings at the taking of the plea, plus the affidavit by Mr. Campriello wherein he states that he informed Mr. Ringel prior to the taking of the plea that it was his intention to request that a jail term be imposed at the time of sentencing, strongly suggests that Mr. Ringel may have misled this defendant by not telling him of the intention of the district attorney, after which he began to discuss restitution with the defendant.

In any event, it is quite clear from a review of this entire matter a hearing is warranted to determine the truth of the facts herein.

s/ Jacob P. Lefkowitz
Jacob P. Lefkowitz

[Duly sworn to
March 6, 1973]

REPLY AFFIDAVIT OF WILLIAM GOLDMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

WILLIAM GOLDMAN, being duly sworn, deposes and says:

1. I am the defendant in the above captioned prosecution.

2. I retained William Ringel, Esq., to represent me in this case.

3. On the 19th day of October, 1972, I entered a plea of guilty to one count of the indictment.

4. Prior to the entry of that plea, I was told by Mr. Ringel that it was unlikely that a jail sentence would be imposed, that I would have "little to worry about on the date of sentence", and that I would be "assured" by making restitution in the amount of $10,000, and if necessary an additional $30,000 which I could realize from the sale of a private home.

5. I was never present at, or a part of, any discussion between Mr. Ringel and any prosecuting official.

6. I am not guilty of these charges and pleaded guilty only because I was led to believe that restitution would assure me of not going to jail.

7. The affidavit of the assistant district attorney appears replete with protestations of my attempts at delay and efforts to prevent the prosecution from going speedily forward. That claim is utterly false. An examination of the very facts as chronologically set forth in the

affidavit clearly is indicative of the promptness and speed with which this case proceeded. I was always under the impression that a district attorney is concerned with justice and the truth also. I am innocent, I want to have my day in court. I have retained Mr. Jacob P. Lefkowitz as my attorney to try this case and I am ready for immediate trial.

8. I wish to be permitted to withdraw my pleas of guilty and stand trial on these charges.

s/ William Goldman
William Goldman

[Duly sworn to
March 6, 1973]

ORDER AMENDING REMITTITUR

STATE OF NEW YORK

in Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of March, A. D. 1974.

PRESENT, HON. CHARLES D. BREITEL,

Chief Judge, presiding.

Mo. No. 263

The People &c.,

Respondent,

vs.

William Goldman,

Appellant.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted. The return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon the following questions under the Constitution of the United States, viz.: Defendant-appellant argued that the denial of defendant's motion for withdrawal of his guilty plea, without a hearing, to determine that he was innocent of the charges and was induced to change his plea by representations as to the sentence that would be imposed, was improper and operated under the circumstances as a denial of his due process rights under the Constitution of the United States; that the trial court failed to properly interrogate and advise the defendant at the time of the taking of the plea which operated under the circumstances as a denial of due process under the Constitution of the United States.

AND the Supreme Court, New York County, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

s/ James M. Flavin
Clerk

(Seal)

SUPREME COURT, U. S.

Supreme Court,
FILE
JUN 5
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1743

WILLIAM GOLDMAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

On Writ of Certiorari to the Court of Appeals of the State of New York

RICHARD H. KUH
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) 732-7300

LEWIS R. FRIEDMAN
JONATHAN LOVETT
Assistant District Attorneys
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1743

WILLIAM GOLDMAN,

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against

THE PEOPLE OF THE STATE OF NEW YORK,

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

On Writ of Certiorari to the Court of Appeals of the State of New York

Preliminary Statement

Petitioner William Goldman seeks a Writ of Certiorari to review a judgment of the Court of Appeals of the State of New York, rendered February 21, 1974, unanimously affirming without opinion, a judgment of the Appellate Division, First Judicial Department, rendered October 16, 1973, which unanimously affirmed without opinion a judgment of the New York State Supreme Court, New York County, rendered March 9, 1973, convicting petitioner, upon his

plea of guilty, of GRAND LARCENY IN THE SECOND DEGREE [New York Penal Law §155.35], and sentencing him to an indeterminate, four-year term of imprisonment. A stay in execution of petitioner's sentence had been granted by Mr. Justice MARSHALL but was revoked by him on May 20, 1974. Thereafter, on May 28, 1974, a second application for a stay in execution of sentence was denied by Mr. Justice MARSHALL.

Jurisdiction

The jurisdiction of this Court is predicated upon 28 U.S.C. §1257(3).

Statement of the Case

By a one hundred and twenty-four count indictment filed on April 28, 1972, petitioner was charged with the crimes of grand larceny in the second degree and offering a false instrument for filing in the first degree. In substance, the indictment alleged that Goldman, a dentist, stole $278,-651.40 from the Department of Social Services and the City of New York by filing fraudulent medicaid dental claims. On May 5, 1972, petitioner pleaded not guilty. Subsequently, during plea negotiations, the prosecutor advised Goldman's then attorney, former New York City Criminal Court Judge William Ringel, that the People intended to recommend a sentence of imprisonment regardless of any offer of restitution by the defendant (A 20).*

Five months later, on October 19, 1972, petitioner, through counsel, offered to plead guilty to one count of grand larceny in the second degree in satisfaction of all

* Numerical references preceded by the letter "A" refer to the pages of petitioner's appendix.

charges. The prosecutor recommended acceptance of the guilty plea (A 28) and during the ensuing colloquy, petitioner acknowledged, *inter alia*, his awareness of the facts that his dentistry license could be revoked as a result of his conviction and that "there has been no promise made to you by your attorney or indication as to what would happen with respect to * * * sentence * * *"(A 30). The court accepted the plea of guilty and scheduled sentencing for November 27, 1972 (A 31). At the request of defense counsel, sentencing was rescheduled for December 11th (A 16).

On December 11th, without any prior notice to the prosecutor, petitioner made a motion for a pre-sentence conference which was conducted on December 27th (A 16). At that time the prosecutor reiterated the People's position to defense counsel that a sentence of imprisonment would be requested. The People also opposed any lengthy adjournment of the sentencing date which was then scheduled for January 16, 1973 (A 16, 20-1).

Without notice to the People and at petitioner's request, sentencing was again rescheduled to February 28th, a date which the court specified as the "final" adjournment (A 16). On that date, petitioner discharged his then counsel and through his current counsel, without any prior notice to the prosecutor, filed a motion to withdraw Goldman's plea of guilty (A 17). Yet another adjournment was thus necessitated to permit the prosecutor to respond to the application. Prior to the conclusion of this proceeding, however, the trial judge noted for the record that petitioner's prior counsel had

> "Done a tremendous job on behalf of [his] client Mr. Goldman. The reasons why Mr. Goldman may have wished to substitute or change counsel at this time are beyond me" (A 17).

In his plea-withdrawal application, "petitioner's primary [legal] argument • • • was that he was induced to change his plea to guilty by representations of his then counsel that no term of imprisonment would be sought or imposed" (petition, pp. 5, 8). In support of this conclusion, petitioner alleged factually that:

1. "deponent was advised by his then attorney • • • that because of the 124 counts in the indictment, he was facing many years in jail"

and:

2. "The fact that counsel was able to obtain an acceptance of a plea of guilty to one count thereof, indicated that deponent had *little to worry* about being sentenced to jail on the day of sentence. Furthermore, that if deponent made restitution, he would assure himself the full *possibility* of not being sentenced to a jail sentence" (A 4) (emphasis added).

In opposition to petitioner's motion, the prosecutor submitted an affidavit containing, as an exhibit, a letter from Goldman's former attorney who stated in relevant part that prior to petitioner's plea of guilty:

> "• • • he was fully advised of the ramification of pleading and was similarly advised that no commitments or promises could be made with regard to punishment or the amount of restitution required.

> "The defendant * * * after being fully advised and stating repeatedly that he did not wish to go to trial, requested that he be allowed to plead guilty * * *
>
> "The matter of restitution was fully discussed with the defendant and he was advised that in our opinion, appropriate restitution would act in mitigation of punishment" (A 33-4).

Specifically responding to the prosecutor's affidavit and exhibit (A 35-8), petitioner submitted a reply affidavit. This time, Goldman alleged:

> "4. Prior to the entry of that [guilty] plea, I was told by Mr. Ringel that it was *unlikely* that a jail sentence would be imposed, that I would have 'little to worry about on the date of sentencing,' and that I would be 'assured' by making restitution" (A 39). (emphasis added)

The court denied Goldman's application without a hearing, concluding that "the defendant's allegations are certainly without merit and without basis" [Certified minutes of sentence, pp. 27-30, submitted by petitioner (petition, p. 5)]. Petitioner was thereafter sentenced to an indeterminate, four-year term of imprisonment.

On March 9, 1973, the Appellate Division, First Judicial Department, unanimously affirmed petitioner's judgment of conviction without opinion (42 A.D.2d 1052). On February 21, 1974, the New York Court of Appeals also unanimously affirmed that judgment without opinion (34 N.Y.2d 539).

ARGUMENT

Petitioner's meritless claims were properly rejected by the New York State Court of Appeals and do not raise susbtantial questions worthy of review by this Court.

Petitioner's counsel argues, as he did below in the state appellate courts, that Goldman should have been afforded an evidentiary hearing on his application to withdraw his guilty plea since petitioner had alleged "that he was induced to change his plea to guilty by representations of his then counsel that no term of imprisonment would be sought or imposed" (petition, p. 5). This argument is frivolous. Goldman never claimed that his counsel had told him that he would avoid a jail sentence by pleading guilty.

In his original, counseled affidavit filed in the trial court in support of his motion to withdraw his plea of guilty, petitioner alleged only that his former attorney had represented that Goldman had "little to worry about being sentenced to jail" and that by making restitution he would "assure himself the full possibility of not being sentenced to a jail sentence" (A 4). Moreover, in Goldman's second, counseled affidavit, submitted in response to the prosecutor and former counsel's answering papers which pointed out that defendant had been advised that no sentence promises had been made and that restitution would only mitigate his sentence (A 20-1, 33-4), petitioner simply reasserted that he had been told by counsel that a jail sentence was "unlikely" and that he would be "assured" by making restitution

(A 39). Manifestly none of these alleged facts support counsel's appellate claim that petitioner was induced to plead guilty by an assurance "that he would not go to jail" (petition, p. 8). And the New York State Court of Appeals, discerning the hollowness of Goldman's claim, properly affirmed his conviction.

Equally without merit is petitioner's secondary argument to this Court that certiorari should be granted and his guilty plea vacated because the trial court failed to inform Goldman in the guilty plea colloquy "of the consequences of his [guilty] plea" (petition, p. 11). That omission, even if it might, in the abstract, be deemed to constitute error, is irrelevant in the instant case. For it is undisputed that Goldman "was fully advised of the ramification of pleading guilty" by his former counsel (A 33) with whom Goldman conceded having specifically discussed possible jail sentences in terms of "years" (A 4). Under these circumstances, the asserted issue is merely hypothetical and, as such, should not be considered by this Court. *Socialist Labor Party* v. *Gilligan,* 406 U.S. 583, 586-7 (1972); *Flast* v. *Cohen,* 392 U.S. 83, 100 (1968); *Stearns* v. *Woods,* 236 U.S. 75, 78 (1915).

Conclusion

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD H. KUH
District Attorney
New York County

LEWIS R. FRIEDMAN
JONATHAN LOVETT
Assistant District Attorneys
Of Counsel

June, 1974